(1)

No. 93-7659-CSY
Status: GRANTED
CAPITAL CASE

Title: Louise Harris, Petitioner
v.
Alabama

Docketed:
January 26, 1994

Court: Supreme Court of Alabama

Counsel for petitioner: Friedman,Ruth E., Stevenson,Bryan A.

Counsel for respondent: Math,Melissa G.

Entry	Date	Note	Proceedings and Orders
1	Jan 26 1994	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	May 31 1994		Brief of respondent Alabama in opposition filed.
4	Jun 9 1994		DISTRIBUTED. June 24, 1994 (Page 7)
5	Jun 15 1994	X	Reply brief of petitioner Louise Harris filed.
7	Jun 27 1994		Petition GRANTED. limited to Questions 1 and 2 presented by the petition.
			**********
9	Aug 5 1994		Order extending time to file brief of petitioner on the merits until August 18, 1994.
10	Aug 18 1994		Record filed.
		*	Certified record proceedings Supreme Court of Alabama and Court of Appeals of Alabama (BOX)
12	Aug 18 1994		Brief of petitioner Louise Harris filed.
11	Aug 26 1994		Joint appendix filed.
13	Sep 20 1994		Brief of respondent Alabama filed.
16	Sep 21 1994		LODGING by respondent. Nine copies of Alabama capital sentencing orders. (BOX)
14	Oct 4 1994		CIRCULATED.
15	Oct 7 1994		SET FOR ARGUMENT MONDAY, DECEMBER 5, 1994. (2ND CASE).
17	Dec 5 1994		ARGUED.
18	Dec 9 1994		Letter from counsel for the petitioner received and distributed.

(2)

ORIGINAL

No. 93-7650

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

Louise Harris

v.

State of Alabama

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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133 pp

QUESTIONS PRESENTED

1. Is a death sentence invalid where a trial court overrides a constitutionally protected jury verdict of life without parole and imposes death, when court relies on no norm or standard for limiting its discretion to override and when it gives no reason as to why the jury verdict is improper?

2. Does a capital sentencing scheme in which trial courts are free to reject jury life-without-parole verdicts without regard to any articulated standard or norm, and in which rejection of those verdicts result in haphazard and inconsistent application of the death penalty, violate the Eighth Amendment?

3. Does a trial court's instruction on reasonable doubt, which equates "beyond a reasonable doubt" with "moral" certainty; requires doubts to be "actual and substantial;" speaks in terms of "an abiding conviction" of the truth of the charge; and requires jurors to have more than "vague" or "speculative" doubts lessen the state's burden of proof in violation of the Fourteenth Amendment's Due Process Clause?

4. Should this Court hold this case until it decides the similar issues presented by Sandoval v. California and Victor v. Nebraska?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

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Louise Harris

v.

State of Alabama

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Petitioner Louise Harris respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Alabama. Ex parte Harris, No. 1920374 (Ala. Jun. 25, 1993).

OPINION BELOW

The opinion of the Supreme Court of Alabama has not yet been reported. (See Attachment A.)

JURISDICTION

The judgment of the Supreme Court of Alabama was issued on June 25, 1993. Ex parte Harris, No. 1920374 (Ala. Jun. 25, 1993). (See Attachment A.) Petitioner's timely Application for Rehearing was denied on October 29, 1993. (See Attachment B.) The

jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3) (1986), petitioner having asserted below and intending to assert here deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in part:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . .

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

The Fourteenth Amendment to the Constitution of the United States provides:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 13A-5-47(3) of the Code of Alabama (1975) provides;

> In deciding sentence, the trial court . . . shall consider the recommendation of the jury contained in its advisory verdict . . . . While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.

STATEMENT OF THE CASE

A. Proceedings Below

Louise Harris was convicted of capital murder in the death of her husband on July 13, 1989 in Montgomery, Alabama. On that same date, the jury returned a sentencing verdict of life imprisonment without parole. On August 12, 1989, the trial court rejected that verdict and imposed death.

On June 12, 1992, the Alabama Court of Criminal Appeals affirmed Mrs. Harris's conviction and sentence of death. Harris v. State, 3 Div. 332 (Ala.Cr.App. Jun, 12, 1992). (See Attachment C.) The Supreme Court of Alabama also affirmed, Ex parte Harris, No. 1920374 (Ala. Jun. 25, 1993), and denied rehearing on October 29, 1993.

B. Relevant Facts

Louise Harris was convicted of capital murder pursuant to Ala. Code §13A-5-40(a)(7) (1975), which renders capital those killings that are for hire or pecuniary gain. The state's theory was that Mrs. Harris had urged Lorenzo McCarter, with whom she was having an extramarital affair, to persuade some of his friends to kill her husband in order for them to pursue the affair or enjoy employment-related insurance benefits. The state's case rested squarely on the testimony of Mr. McCarter, who gave evidence pursuant to a plea agreement by which he

escaped the death penalty himself. Mrs. Harris testified that while she was romantically involved with Mr. McCarter she had no part in his plan to murder her husband.

The sole evidence used in aggravation in the case was that encompassed in the offense itself--that the killing was allegedly committed for pecuniary gain. Ala. Code §13A-5-49(6) (1975). Considerable evidence of a mitigating nature was presented. For example, at the time of her trial, Louise Harris was a 36-year-old black mother of three who was the caretaker for her own children as well as her husband's four. At the same time she held three jobs and was very active in her church. The evidence was that she was exceptionally well respected by her employers, fellow churchgoers, and prominent members of the Montgomery community, many of whom testified as to her excellent character and community service. She had an unblemished record prior to this offense. Moreover, the man who admitted having personally arranged the killing of Mr. Harris received a sentence less than death by implicating petitioner in the crime.

The death-qualified jury that heard the evidence and arguments of counsel weighed the aggravating circumstance against the mitigating circumstances and sentenced Mrs. Harris to life in prison without possibility of parole rather. The trial court, however, rejected that verdict. Conceding that there was a single aggravating factor which was inherent in the offense itself and acknowledging that there were both statutory and nonstatutory mitigating circumstances, including petitioner's

outstanding reputation, the trial judge nevertheless substituted its judgment for that of the jury and imposed death. See Ala. Code §13A-5-47(e) (1975). At no point did the trial court's order refer to any standard by which it was able to determine that override was appropriate. Nor did it explain what, if any weight was accorded the jury's verdict in imposing sentence.

This practice of substituting sentencing judgments is not uncommon in Alabama. Nearly one-quarter of the members of Alabama's death row arrived there as a result of override. In some of those cases, the trial court explained why it was rejecting the jury's verdict; in others it did not. In some the jury verdict was considered and weighed as a mitigating factor; in others it was considered but not as mitigation; and in still others it was never even mentioned by the trial court. No trial court has pointed to a known rule by which it could determine that an override was called for in a particular case.

In affirming Mrs. Harris's sentence of death, the Alabama appellate courts did not consider the override against any objective measure of propriety: In fact, they did not consider the override at all. As in nearly every affirmance of a death sentence that resulted from the use of override authority, the Alabama Court of Criminal Appeals[1] simply noted that rejection of the jury verdict is contemplated in the statute and was thus

[1]The Alabama Supreme Court did not even address the issue other than, in denying rehearing, to summarily reject an additional state constitutional challenge to the practice. (See Attachment B.)

permitted here.[2]

Earlier in the case, at the guilt phase of the trial, the court's instructions defined "reasonable doubt" so as to equate it for the jury with "moral certainty." The court relied on the definition "moral certainty" *fifteen* times in explaining the charge. (R. 917, 919, 921, 924, 925, 927, 932, 933, 935, 936, 938, 940, 941, 946)[3] The court continually used the phrase "beyond a reasonable doubt and to a moral certainty" as if the two were synonymous. It also told the jurors that a reasonable doubt would have to be an "actual and substantial" doubt and defined the jurors' certainty in terms of an "abiding conviction." (R. 921) The court went on to use a number of other terms to define the standard of proof, including the charge that a reasonable doubt is "not some mere fanciful, vague, conjectural, or speculative doubt." (R. 921)

HOW THE FEDERAL QUESTION WAS PRESENTED AND DECIDED BELOW

Petitioner presented both the override claim and the Cage violation to the Alabama Court of Criminal Appeals. That court

[2]That court also relied on this Court's decision in Proffitt v. Florida, 428 U.S. 252 (1976) in reaching that conclusion. (See Attachment C, at 71-72.) Proffitt, however, dealt not with Alabama's but with Florida's sentencing scheme, which differs considerably with the one at issue here. This is discussed below.

[3] "R.___" refers to the page in the trial transcript.

upheld the override by citing to the Alabama statute authorizing it and by relying on Proffitt v. Florida, 428 U.S. 252 (1976). (See Attachment C, at 71-72). With regard to the reasonable doubt charge, the court never addressed that claim directly other than to deny petitioner's "other claimed [instructional] errors." (See Attachment C, at 71.) The opinion of the Alabama Supreme Court did not address either issue, despite the fact that both were also briefed to it at length. (See Attachment A.)

Mrs. Harris relied on the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution in presenting each claim.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD DECIDE WHETHER A TRIAL COURT CAN SUMMARILY REJECT A CONSTITUTIONALLY PROTECTED JURY VERDICT OF LIFE-WITHOUT-PAROLE AND IMPOSE DEATH WITHOUT RELIANCE ON ANY STANDARD FOR DETERMINING WHEN OVERRIDE IS WARRANTED.

Alabama is the only state in the country which allows trial courts to reject jury capital sentencing verdicts based on the judges' own individual considerations and without reference to any uniform norm or standard. Ala. Code §13A-5-47 (3) (1975). Of the three states that permit override of a jury recommendation of life--Florida, Indiana, and Alabama[4]--only Alabama has articulated no standard to guide the judge's action. See Tedder

[4]Delaware has amended its statute to create a scheme more akin to strict judicial sentencing than the Alabama override. Del. Code Ann. tit. 11, § 4209 (1991).

v. State, 322 So. 2d 908 (Fla. 1975) (trial courts may override jury life verdicts only if "the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ"); Chavez v. State, 539 N.E.2d 4 (1989) (for a judge to impose death after a jury life recommendation, "the facts justifying a death sentence should be so clear and convincing that virtually no reasonable person could disagree that death was appropriate").

In upholding Florida's override provision, this Court specifically "recognized the significant safeguard the Tedder standard affords a capital defendant." Spaziano v. Florida, 468 U.S. 447, 465 (1984). In Dobbert v. Florida, 432 U.S. 282, 295 (1977), then Justice Rehnquist described the Tedder rule as the "crucial protection" against arbitrary or standardless override. The capital system in Alabama is lacking in such a protective measure.

A. The Alabama Sentencing Scheme Provides for a Constitutionally Protected Jury Sentencing Verdict.

The jury is clearly meant to play an important role in Alabama's capital punishment system. The state's present statute was formulated after the Alabama Supreme Court's decision in Beck v. State, 396 So. 2d 645 (Ala. 1980) revised the capital sentencing procedures. In Beck, the Alabama Supreme Court noted that "[t]hroughout Alabama's history, juries have played a major role in capital cases." Id. at 659. After reviewing the history of the death penalty in Alabama and refusing to eliminate jury

participation in capital sentencing proceedings, the court held that the legislature intended for there to be jury participation in capital sentencing. The court went on to acknowledge that "[j]ury sentencing has been considered desirable in capital cases in order 'to maintain a link between contemporary community values and the penal system--a link without which the determination of punishment could hardly reflect "the evolving standards of decency that mark the progress of a maturing society."'" Id. at 661 (quoting Gregg v. Georgia, 42 U.S. 153, 188-92 (1976)).

Alabama's current sentencing procedures reflect this focus. A capital defendant has an absolute right to a jury sentencing hearing which can be waived only by the express consent of the defendant, the prosecutor, and the trial judge. Ala. Code §13A-5-46(a) (1975). The jury's verdict is carefully guided by specific statutory requirements that direct the finding, consideration and weighing of aggravating and mitigating circumstances. Ala. Code §13A-5-46(e (1975). If the jurors cannot reach a sentencing determination, a mistrial is declared and another sentencing hearing must be held before another jury. Ala. Code §13A-5-46(g) (1975).

The weight of the jury's role is underscored by the fact that the Alabama Supreme Court has refused to permit errors affecting the jury verdict to go uncorrected even though the judge is the ultimate sentencer. In Ex parte Williams, 556 So. 2d 744 (Ala. 1987), for example, the court required a new jury

sentencing hearing where the jury considered an invalid aggravating factor even though the trial court did not. The court stated that

> [t]he legislatively mandated role of the jury in returning an advisory verdict, based upon its consideration of aggravating and mitigating circumstances, cannot be abrogated by the trial court's errorless exercise of its equally mandated role as the ultimate sentencing authority . . . . To hold otherwise is to hold that the sentencing role of the jury, as required by statute, counts for nothing so long as the court's exercise of its role is without error.

Id. at 745. Other errors that would have affected only the jury's determination and not the trial court's have also necessitated reversal. See, e.g., Ex parte Rutledge, 482 So.2d 1262 (Ala. 1984) (prosecutor's argument during sentencing phase that as long as parole boards, federal courts and legislature exist, there is a chance the defendant will get out on a parole required reversal); Ex parte Whisenhant, 482 So.2d 1249 (Ala. 1984) (fact that attorney general made reference during penalty argument to other crimes by defendant but never offered any proof required new sentencing hearing); see also Hallford v. State, 548 So. 2d 526 (Ala.Cr.App. 1988) (jury must be given limiting instruction on heinous, atrocious and cruel aggravating factor).

Alabama is thus not a state in which juries are excluded from the capital sentencing process. However, the Alabama statute also provides that the trial court can override the jury's verdict. Ala. Code §13A-5-47(e) (1975). What neither the statute nor the case law has established, however, is a guide for

judges to determine when rejection of the jury verdict is warranted and when it is not.

B. The Absence of a Standard Results in Haphazard Consideration and Rejection of Jury Life-Without-Parole Verdicts by Alabama Trial Courts.

Because the override is standardless in Alabama, trial judges give varying degrees of weight to the jury verdict or, in some cases, give it none at all. Few judges give any reason as to why the jury verdict was not to be respected. The result is a haphazard and inconsistent application of the ultimate sanction in a manner that is inconsistent with the precedents of this Court. See Maynard v. Cartwright, 108 S.Ct. 1853, 1858 (1988) ("the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action"); Dobbert v. Florida, 432 U.S. at 295 (Tedder provision protects against standardlessness in use of override).

The inconsistency in the use of the override becomes obvious in examining just a few Alabama cases. For example, some courts regard the jury's life-without-parole recommendation as a mitigating factor to be considered and weighed with other mitigation against the aggravation. See, e.g., Musgrove v. State, 519 So. 2d 565, 585 (Ala.Cr.App. 1986), aff'd, 519 So. 2d 586 (Ala. 1988) (jury recommendation of life imprisonment without parole is formally considered as one of five mitigating

circumstances); Murry v. State, 455 So. 2d 53, 72 (Ala.Cr.App. 1983), rev'd on other grounds, 455 So. 2d 72 (Ala. 1984) (sentencing judge concludes that he "can only categorize recommendation as a mitigating circumstance"). Other capital defendants, however, do not receive the benefit of the jury verdict in the weighing process. See, e.g., Harrell v. State, 470 So.2d 1303, 1307 (Ala.Cr.App. 1984) (trial judge found no statutory or "un-enumerated mitigating circumstances" despite jury's life recommendation); Crowe v. State, 485 So.2d 351 (Ala.Cr.App. 1984), rev'd on other grounds, 485 So.2d 373 (Ala. 1984) (same); Jones v. State, 456 So.2d 366 (Ala. 1983) (same). This inconsistency is sometimes apparent even within the practices of a single court: While the jury verdict was not considered as a mitigating circumstance in Mrs. Harris's case, it was weighed in such a fashion in another case in which the same judge overrode. See Hooks v. State, 534 So.2d 329, 361 (Ala.Cr.App. 1987).

Some trial courts reject the jury verdict because they believe that it was in some respect flawed. See, e.g., Ex parte Hays, 518 So.2d 768, 777 (Ala. 1986) (jury life recommendation "an unquestionably bizarre result"); Crowe v. State, 485 So.2d 351 (Ala.Cr.App. 1984), rev'd on other grounds, 485 So.2d 373 (Ala. 1985) (jury must have made a mistake in weighing aggravating and mitigating factors). Others have guessed at how the jury arrived at its life-without-parole verdict and rejected the recommendation on the basis of that surmise. See, e.g., Boyd

v. State, 542 So.2d 1247 (Ala.Cr.App. 1988) (court suspects jury influenced by testimony of defendant's family). On the other hand, some courts reject the jurors' recommendation after explicitly noting that they had not made any mistakes. See Murry v. State, 455 So.2d at 72 (judge stated it would be "erroneous to conclude or say that the court has rejected the recommendation of the jury in setting sentence" before overriding a life verdict); Jones v. State, 456 So.2d 366, 379 (Ala.Cr.App. 1983) (trial court expressly noted that it was "not chastising or inferring that the jury was lax in their responsibility").

In some instances, judges have overridden on the basis of considerations either not relevant to the case at hand or not in the record. See, e.g., Jones v. State, 456 So.2d at 379 (judge overrode to set an example and to "follow his own conscience"); Padgett v. State, ___ So. 2d ___ (appeal pending) (judge overrides because he has made own, unstated determination as to why crime occurred). In others, as in the case at bar, the trial court never says what weight, if any, was given to the jury verdict in passing sentence.[5]

It is thus often impossible to tell why a jury verdict was rejected; what process was used in reaching the override determination; which defendants had their jury verdicts weighed into the aggravation/mitigation calculus and which did not; and which were sentenced to death by judges who gave the recommendation little if no weight at all. Without requiring

[5]State's Supplemental Record.

sentencing judges to conform to some standard for consideration of jury verdicts there can be little uniformity in when or how they are accepted or rejected. The constitutional requirement that there be "measured, consistent application" of the death penalty and "fairness to the accused" is thus clearly not met. Eddings v. Oklahoma, 455 U.S. 104, 110-11 (1982).

C. The Judicial Override in this Case was Unguided and Inappropriate.

The trial court gave no explanation for rejecting the jury's sentencing verdict in this case. Indeed, it never stated whether it gave that verdict any weight at all in deciding to sentence petitioner to death.[6] It is certainly clear that the jury's determination was not deemed a mitigating circumstance[7] or weighed with the other statutory and nonstatutory mitigation against the single aggravating factor. What role, if any, the jury's determination made in the court's decision is unclear. Whether a different court would have overridden in this case or even considered the same variables in reaching its decision is also unknown.

Nor is this a case where "the facts suggesting a sentence of

[6]The trial court merely stated that it "considered" the jury's recommendation. State's Supplemental Record.

[7] The arbitrariness of the process is exemplified by the fact that this same trial judge does not even use the same standard when considering rejection of a jury verdict. In Hooks v. State, 534 So.2d 329, 361 (Ala.Cr.App. 1987), for example, the same court considered the jury verdict as a mitigating factor and weighed it against the aggravating before arriving at sentence. Louise Harris should at least have been accorded the same process.

death are so clear and convincing that virtually no reasonable person could differ." Proffitt v. Florida, 428 U.S. 242, 249 (1976) (quoting Tedder v. State, 322 So. 2d 908 (Fla. 1975)). On the contrary, the single aggravating factor was the same as that which comprised the capital offense--that the crime was committed for pecuniary gain--while the mitigating circumstances, as found by the trial court, were numerous: petitioner had never been convicted of a crime (Ala. Code § 13A-5-51 (1) (1975)) and indeed had an unblemished record; she was an active participant in her church; she was the primary caretaker for seven children; she worked three jobs; and she was held in unusually high regard from numerous citizens from varying segments of the Montgomery community. Moreover, her codefendant, who admitted arranging the killing, was given life without parole. There is nothing in the record to reflect why the jury verdict should not have been sustained.

The hallmark of the modern death penalty is the "guided discretion" afforded the sentencer. Gregg v. Georgia, 428 U.S. 153 (1976). That guidance is wholly absent where a defendant may face an override based on a set of factors or an unstated measure not shared by other trial courts.[8] Without a standard to guide the courts' discretion, the result is likely to be arbitrary imposition of a death sentence as was the case here.

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[8]Where a similarly situated defendant is *not* subject to the override, equal protection concerns arise.

II. THIS COURT SHOULD DETERMINE WHETHER A CAPITAL SENTENCING SCHEME FAILS TO SATISFY EIGHTH AMENDMENT REQUIREMENTS WHERE THERE IS NO APPELLATE REVIEW MECHANISM TO ENSURE EVENHANDED APPLICATION OF THE OVERRIDE, AND WHERE THERE IS NO REVIEW GIVEN TO THE PROPRIETY OF THE OVERRIDE IN A GIVEN CASE.

Nearly a quarter of the people sent to Alabama's death row arrived there as a result of judicial override. The Alabama trial courts have overridden in such cases as that of Walter McMillian, an innocent man who was later freed on appeal, McMillian v. State, 616 So. 2d 933 (Ala.Cr.App. 1993); Clayton Flowers, a fifteen-year-old whose death sentence was not even constitutional, Flowers v. State, 586 So. 2d 978 (Ala.Cr. App. 1991); Richard Frazier, twice sentenced to life-without-parole by juries and twice subject to judicial override, Frazier v. State, 562 So. 2d 543 (Ala.Cr.App.), rev'd on other grounds, 562 So. 2d 560 (Ala. 1989); and Darryl Freeman, who received an unanimous life-without-parole recommendation. Freeman v. State, 555 So. 2d 196 (Ala.Cr.App. 1989), aff'd, 555 So.2d 215 (Ala. 1989). The most recent affirmance of an override was also following a unanimous jury decision for life without parole. Sockwell v. State, ___ So. 2d ___ (Ala.Cr.App. Dec. 30, 1993). In reviewing the sentences of those with jury overrides, the Alabama appellate courts have not acted to ensure uniformity or evenhanded application of the procedure.

A. Appellate Review is Integral to the Constitutionality of Alabama's Capital Sentencing Statute.

It is clear that appropriate appellate review is integral to the constitutionality of any death penalty system. Gregg v. Georgia, 428 U.S. 153 (1976). Appellate review is no less critical where the death sentence was imposed after a jury returned a life verdict. Indeed, this Court made that point clear in reversing a Florida death sentence that was the result of jury override:

> We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally. We have specifically held that the Florida Supreme Court's system of independent review of death sentences minimizes the risk of constitutional error, and have noted *the "crucial protection" afforded by such review in jury override cases.*

Parker v. Dugger, 112 L.Ed.2d 812, 826 (1991) (emphasis added). In reversing Parker's death sentence, this Court commented that

> the Florida Supreme Court did not conduct an independent review here. In fact, there is a sense in which the court did not review Parker's sentence at all.

Id. While the lack of meaningful review of override cases may be rare in Florida,[9] it is far from uncommon in Alabama. Indeed, without any standard of review, there is no principled way for the courts to distinguish those cases in which override is

[9] See Spaziano v. Florida, 468 U.S. at 465 (where this Court noted its satisfaction "that the Florida Supreme Court takes that standard seriously and has not hesitated to reverse a trial court if it derogates the jury's role").

appropriate from those in which it is not.

B. The Alabama Courts have Developed No Mechanism for Determining whether an Override was Appropriate in a Given Case, Resulting in an Arbitrary and Capricious Application of the Procedure.

In a comprehensive article published in 1982 on Alabama's death penalty statute, Alabama Circuit Court Judge Joseph A. Colquitt made the following observation regarding override of a jury sentencing verdict:

> The rejection of a jury verdict is a serious matter traditionally limited by law. Although the 1981 Act makes the jury's action advisory, the jury's recommendation should not be taken lightly. Alabama appellate courts can reasonably be expected to develop and apply restrictions to a trial judge's power to reject a sentence recommended by a jury.

Colquitt, *The Death Penalty Laws of Alabama*, 33 **Ala.L.Rev.** 213, 328 (1981) (citations omitted). Such restrictions have not, however, been developed or applied. The Alabama appellate courts therefore have no basis or standard on which to rely when reviewing a death sentence resulting from the override.

Consequently, there is generally no discussion in a review of an Alabama death sentence as to why the override was appropriate. When the override is discussed at all, it is usually only to affirm the very existence of override authority. See, e.g., Lindsey v. State, 456 So.2d 383, 390 (Ala.Cr.App. 1983) (trial court "authorized to disregard" jury life verdict). Often the appellate courts do not even consider the jury's life verdict in affirming sentence. See, e.g., Boyd v. State, 542 So.

2d 1247 (Ala.Cr.App 1988), aff'd, 542 So. 2d 1276 (Ala. 1989); Johnson v. State, 521 So. 2d 1006 (Ala.Cr.App.), aff'd, 521 So. 2d 1012 (Ala. 1986). As a result, the Alabama appellate courts have upheld overrides both where trial courts considered the jury's recommendation as a mitigating circumstance and where they did not; where the trial court believed the jury had been improperly influenced and where it did not; and where the trial courts explained why an override was warranted and where they did not. See supra. The courts have developed no yardstick by which to measure when override authority should have been used and when it was not called for.

As in this case (see Attachment C, at 71-72), the reviewing courts have sustained the override largely on the basis of this Court's decision in Spaziano v. Florida, supra. See also Owens v. State, 531 So.2d 2, 15-16 (Ala.Cr.App. 1986); Crowe v. State, 485 So.2d at 364-65; Harrell v. State, 470 So.2d at 1309. The court in Ex parte Jones, 456 So.2d 381, 383 (Ala. 1984), went so far as to say that the Alabama system "conform[s] to the statutory purpose of Florida's statute as approved by the United States Supreme Court." Yet the Alabama courts have continually failed to confront the fact that Florida's sentencing framework was deemed constitutional in reliance on the "crucial protection" provided by the Tedder rule.[10] See Dobbert v. Florida, 432

[10]Indeed, the Alabama Court of Criminal Appeals has described the Tedder standard as merely an "extra" safeguard afforded capital defendants. Murry v. State, 455 So. 2d at 65.

U.S. 282, 295 (1977). While that rule provides the Florida Supreme Court with a mechanism for evaluating overrides,[11] there is no comparable tool in Alabama.

Alabama Supreme Court Justice Maddox averred in a concurring opinion that appellate courts in Alabama protect against arbitrary imposition of death sentences by being "especially sensitive to their roles when there is a jury override." Ex parte Tarver, 553 So. 2d 633, 635 (Ala. 1989) (Maddox, J., concurring). Yet under Alabama's practice--where trial courts approach the override in an inconsistent manner, and where a capital defendant may be subject to override in one court but not in another--there is no appellate mechanism for ensuring evenhandedness. It has become clear that absent some standard, there is no way to assure against arbitrary application of the procedure.

C. The Alabama Appellate Court Conducted no Analysis to Determine whether Rejection of the Jury's Life-Without-Parole Verdict was Warranted in Louise Harris's Case.

The appellate courts' only discussion of the override in petitioner's case was once again to rely on the Florida scheme as approved in Proffitt v. Florida, supra, and to cite to the Alabama statute authorizing the practice. (See Attachment C, at 71-72.) While the Alabama Court of Criminal Appeals went on to reject Mrs. Harris's contention that inadmissible evidence was

[11]The Florida Supreme Court clearly takes that role very seriously, reversing where overrides are not legally sound and affirming where they are. See Grossman v. State, 525 So. 2d 833, 851 (Fla. 1988).

considered in the sentencing itself, id. at 73-75, the court never addressed whether rejection of the jury recommendation was warranted or constitutionally sound in this case. The Alabama Supreme Court never addressed the question. Neither court paid any heed to the jury's life-without-parole verdict. It thus cannot be said that petitioner's sentence of death was accorded the "meaningful appellate review" that the Eighth Amendment requires. Parker v. Dugger, 112 L.Ed.2d at 826.

The issue of the standardless override has never been addressed by this Court. This Court should take certiorari in this case to determine whether the absence of a limiting standard deprives capital defendants of Eighth and Fourteenth Amendment protections and whether the rejection of the jury's verdict was unconstitutional in Mrs. Harris's case.

III. THIS COURT SHOULD DECIDE WHETHER DEFINING "REASONABLE DOUBT" IN TERMS OF "MORAL CERTAINTY," "ACTUAL, SUBSTANTIAL DOUBT," NO "VAGUE OR SPECULATIVE DOUBT" AND AN "ABIDING CONVICTION" VIOLATES DUE PROCESS GUARANTEES.

The Fourteenth Amendment's Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). See also Patterson v. New York, 432 U.S. 197 (1977). The reasonable doubt standard further protects the accused against the "risk of convictions resting on factual error." Winship, 397 U.S. at 363. An accurate instruction on the standard of proof is the mechanism

by which these due process guarantees are ensured.

This Court clarified the need for reliable reasonable doubt instructions when it reversed a conviction in Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328 (1990). The Louisiana trial court had defined reasonable doubt in terms of "grave uncertainty," "actual substantial doubt," and "moral certainty." Cage v. Louisiana, 111 S. Ct. at 329. This Court explained why such a charge ran the risk of impermissibly lessening the state's burden of proof in the jury's eyes.

> The charge did at one point instruct that to convict, guilt must be found beyond a reasonable doubt; but it then equated reasonable doubt with a "grave uncertainty" and an "actual substantial doubt," and stated that what was required was a "moral certainty" that the defendant was guilty. It is plain to us that the words "substantial" and "grave," as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements are then considered with the reference to "moral certainty," rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below than that required by the Due Process Clause.

Id. at 329-30.

This Court has more recently underscored the gravity of an error of this nature. Noting that where an instruction has lessened the state's burden of proof, "there has been no jury verdict within the meaning of the Sixth Amendment," and therefore an instructional error of this kind cannot be considered harmless. Sullivan v. Louisiana, 124 L.Ed.2d 182, 189 (1993). See also id. at 191 (denial of right to verdict of guilt beyond a

reasonable doubt is "structural" error which undermines reliability of trial process). It is an error of this dimension that occurred at Petitioner Harris's trial.

A. The Trial Court's Charge in Petitioner's Case is Inconsistent with this Court's Holding in Cage v. Louisiana.

The instructions at the guilt phase of Louise Harris's trial were flawed in the same manner as those condemned in Cage. Indeed, the trial court could have left no doubt that "beyond a reasonable doubt" and "to a moral certainty" were synonymous because every time the charge used the former phrase it was coupled with the latter.

> [T]he only determination for you and that you are to make at this time is to whether the State has proven beyond a reasonable doubt and to a moral certainty that the defendant is guilty of the capital offense.

(R. 917)

> The first thing I would say to you about beyond a reasonable doubt and to a moral certainty is that the terms mean what they say, beyond a reasonable doubt and to a moral certainty.

(R. 919)

> We know what the measuring stick is now; that is, beyond a reasonable doubt and to a moral certainty.

(R. 922-23) The jury instruction used the term "moral certainty" *fifteen* times in explaining the state's burden of proof. (R. 917, 919, 921, 924, 925, 927, 932, 933, 935, 936, 938, 940, 941, 946) The jury was directed to employ the yardstick "beyond a reasonable doubt and to a moral certainty" in weighing testimony

(R. 924); in measuring the state's case (R. 925); in determining facts (R. 927); in deciding whether Mrs. Harris procured the death of her husband (R. 932); in concluding whether she was guilty of intentional murder (R. 933); and in every aspect of their decisionmaking. These jurors were told to think of "reasonable doubt" only in terms of moral certainty.

This Court held in Cage that moral certainty is not the same as evidentiary certainty. Cage v. Louisiana, 112 L.Ed.2d at 342. The lower courts have gone on to reverse convictions where the moral certainty instruction was given, particularly in conjunction with other problems in the charge. See, e.g., Morley v. Stenberg, 828 F. Supp. 1413 (D. Neb. 1993) (relevant inquiry under Due Process Clause is not whether the challenged phrase parrots precise language found improper in Cage, but whether language tends to overstate degree of doubt required to acquit or understate degree of certainty required to convict); State v. Manning, 409 S.E.2d 372 (S.C. 1991), cert. denied, 112 S.Ct. 1282 (1992) (jury instructions equating "moral certainty" with "beyond a reasonable doubt" together with other improper terms violated Constitution). The mere use of "moral certainty" has also been found to justify reversal. In Perez v. Irwin, 963 F.2d 499 (2nd Cir. 1992).

The court's instructions, however, went beyond the consistent reliance on moral certainty. They also told the jury that for a doubt to be reasonable it would have to be an "actual and substantial" doubt. (R. 921). This Court has also condemned

such terms.

> It is plain to us that the words "substantial" and "grave," as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard.

Cage v. Louisiana, 112 L.Ed.2d at 342. The lower courts have not allowed verdicts to stand that were obtained on the basis of a charge equating "reasonable" with "substantial" doubts. See, e.g., Adams v. Aiken, 965 F.2d 1306 (4th Cir. 1992) (instruction which equated reasonable doubt with "substantial doubt" violated due process clause); Monk v. Zelez, 901 F.2d 885 (10th Cir. 1990) (granting habeas relief because jury instruction defined reasonable doubt as "substantial, honest, conscientious doubt"); United States v. Atkins, 487 F.2d 257, 260 (8th Cir. 1973) ("substantial doubt" does not equal "reasonable doubt").

When jurors are told both that their doubts must be "substantial" to acquit and that their degree of certainty is a "moral" rather than evidentiary concern, the state has not been held to the burden of proof required by the Due Process Clause. Cage v. Louisiana, 112 L.Ed.2d at 342. This is precisely what happened in petitioner's case. This Court should hold that the instructions given here were also in violation of due process guarantees. See also United States v. Devereaux, No. 91-30163, 1993 WL 272532, at *2 (9th Cir. July 21, 1993) (instruction describing reasonable doubt as "an actual and substantial doubt" that fails to convince jurors "to a moral certainty" of defendant's guilt found inadequate).

B. The Trial Court Used other Terms in Defining Reasonable Doubt that Aggravated the Cage Error.

The state's burden of proof was further lessened by other of the court's instructions. The charge went on to tell the jurors that a reasonable doubt is "not some mere fanciful, vague, conjectural, or speculative doubt" (R. 921) and to define the jurors' decisionmaking in terms of an "abiding conviction." (R. 921)

As this Court noted in Cage, the relevant inquiry is how the jurors could have understood the charge as a whole. Cage v. Louisiana, 112 L.Ed.2d at 342 (citing Francis v. Franklin, 471 U.S. 307, 316 (1985)). The reasonable doubt charge in this case was problematic in its entirety. From the very start of the long charge until its end, virtually every time it used the term, the trial court literally equated reasonable doubt and moral certainty. It then changed the definition from "reasonable" to "substantial."[12] The jurors were then told just which of their doubts would not suffice.

This last charge was indeed problematic. For example, a "vague" doubt of guilt was, according to the charge, insufficient for acquittal. Yet a juror who looked at the state's case and was not quite convinced, but could not point to just which witness or piece of evidence alone was inadequate, might term his

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[12]The two are clearly not synonymous and would lead any person to very different conclusions: For example, being told of a "reasonable" likelihood that a risky operation will be successful rather than of a "substantial" likelihood might cause a sick patient to choose widely different courses of action.

or her doubt "vague."[13] Such a juror could feel compelled to vote for guilt despite a belief that the prosecution had not quite proved its point. See id. (words must be given their commonly understood meaning).

Courts evaluating similar instructions have deemed them fatally flawed. See, e.g., Pettine v. Territory of New Mexico, 201 F.2d 489, 496-97 (8th Cir. 1912) (requiring demonstrably logical doubts defeats purpose of reasonable doubt burden); Dunn v. Perrin, 570 F.2d 21 (1st Cir. 1978), cert. denied, 437 U.S. 910 (1978) (holding unconstitutional a reasonable doubt charge urging jurors to be "morally certain," to have a doubt for which they could give a "good and sufficient reason," and to hold "a strong and abiding conviction"); State v. Manning, 409 S.E.2d 372 (S.C. 1991), cert. denied, 112 S.Ct. 1282 (1992) (jury instructions equating "moral certainty" with "beyond a reasonable doubt" together with other improper terms violated Constitution); see also Sandoval v. California, 841 P.2d 862 (Cal. 1992), cert. granted, ___ U.S. ___, 114 S.Ct. 40 (Sept. 28, 1993) (reviewing instruction which made reference to an "an abiding conviction of the truth of the charge" and required more than "mere possible doubt").

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[13]A juror may very well have been skeptical of codefendant McCarter's testimony in a way that would have been difficult to defense, yet might have led him or her to doubt petitioner's guilt of the crime charged.

IV. THIS COURT SHOULD HOLD THIS CASE PENDING ITS DECISION IN SANDOVAL V. CALIFORNIA AND VICTOR V. NEBRASKA.

This Court is obviously concerned with instructions that might serve to diminish the state's burden of proof in criminal (and particularly capital) cases. This term it accepted review in two cases that examine the scope of Cage and raise additional problematic definitions of reasonable doubt. See Sandoval v. California, 841 P.2d 862 (Cal. 1992), cert. granted, ___ U.S. ___, 114 S.Ct. 40 (Sept. 28, 1993); Victor v. Nebraska, 494 N.W.2d 565 (Neb. 1993), cert. granted, ___ U.S. ___, 114 S.Ct. 39 (Sept. 28, 1993).

The issue in Mrs. Harris's case is virtually identical to those currently pending before the Court. As in the two pending cases, the trial court in petitioner's case equated reasonable doubt with "moral certainty." As in those cases, it also defined the requisite doubt in terms of "an abiding conviction of the truth of the charge." This Court will also be examining the "actual and substantial doubt" definition that was given in both Victor v. Nebraska and Mrs. Harris's case. Finally, this Court in Sandoval is weighing the constitutionality of the no "mere, possible doubt" instruction which is similar to the charge on "not some mere fanciful, vague, conjectural, or speculative doubt" given petitioner's jurors. As the issues in this case are

substantially identical to those now pending at the Court,[14] Mrs. Harris respectfully urges that her petition not be ruled on until those issues are resolved.

CONCLUSION

This Court should grant certiorari to determine whether the absence of a limiting standard renders Alabama's statutory jury override scheme unconstitutional and whether the reasonable doubt instruction given in this case violates due process.

Respectfully submitted,

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[14]The instruction in petitioner's case was in fact more flawed than that given in Sandoval or Victor in that the trial court used a succession of inaccurate terms and used them continuously throughout the charge. See supra.

93-7659

ORIGINAL

CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached document has been served upon counsel for the State of Alabama, Robert Lusk, Esq., and Sandra Stewart, Esq., Office of the Attorney General, Alabama State House, 11 South Union Street, Montgomery AL 36130 by placing same in the United States Mail, postage prepaid.

This the 26th day of January, 1994.

Ruth E. Friedman
Ruth E. Friedman

ATTACHMENT A

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1992-93

1920374

Ex parte Louise Harris

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(In re: Louise Harris

v.

State of Alabama)

(Montgomery Circuit Court, CC-88-1237;
Court of Criminal Appeals, 3 Div. 332)

HOUSTON, JUSTICE.

This is a capital murder case. A detailed statement of the facts appears in the opinion of the Court of Criminal Appeals, Harris v. State, [Ms. 3 Div. 332, June 12, 1992] ____ So.2d ___ (Ala.Cr.App. 1992).

Louise Harris was convicted of capital murder; the jury recommended a sentence of life imprisonment without parole. The

trial court overrode the jury's recommendation and sentenced Harris to death by electrocution. Judge Bowen, writing for the Court of Criminal Appeals, affirmed Harris's conviction with a lengthy opinion, from which Judge Montiel dissented. The Court of Criminal Appeals overruled Harris's application for rehearing and denied her Rule 39(k), Ala.R.App.P., motion, without opinion. We then granted certiorari review pursuant to Rule 39(c), Ala.R.App.P.

Having carefully read and considered the record, together with Harris's 141-page brief, the state's 237-page brief, and Harris's 18-page reply brief, we conclude that the Court of Criminal Appeals correctly resolved the issues discussed in its opinion. We do note, however, the issue on which Judge Montiel dissents -- whether Harris had an absolute right to be present at "all pretrial proceedings relating to [her] case" (i.e., proceedings involving questions of law, questions of procedure, or questions regarding the removal of Harris's counsel), pursuant to the guarantees of the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fifth Amendment of the United States Constitution and because every criminal defendant, particularly a defendant in a capital murder case, has the fundamental right to participate in the preparation of her defense. Suffice it to say, without further discussion, that after thoroughly reviewing the record and the applicable law, we are satisfied that the Court of Criminal Appeals adequately addressed and correctly resolved this issue.

We note also that Harris has raised in this Court several issues that were either not presented to or not addressed by the Court of Criminal Appeals. Because this Court may consider any issue in a capital case concerning the propriety of the conviction and the death sentence, and, more importantly, because a person's life hangs in the balance, we have fully considered each of the additional issues Harris has raised. Furthermore, we have independently searched the record for error, as did the Court of Criminal Appeals. However, after carefully researching the applicable law and after exhaustively scouring the record for error, we find no reversible error in the proceedings below.

We do feel, however, that the following issue, raised by Harris in this Court, warrants further discussion: Whether the absence of a full transcript of the voir dire examination of the jury and all bench conferences denied Harris a fundamentally fair trial in violation of state law and in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and thus constituted reversible error.

Harris bases her argument on Rule 19.4(a), Ala.R.Crim.P., which requires:

> "In all capital cases (criminal trials in which the defendant is charged with a death penalty offense), the court reporter shall take full stenographic notes of voir dire of the jury and of the arguments of counsel, whether or not such is ordered by the judge or requested by the prosecution or defense. This duty may not be abrogated by the judge or waived by the defendant."

(Emphasis added.) This case was commenced before the adoption of Rule 19.4; therefore, Rule 19.4 is not applicable in this case. Rather, Temporary Rule 21, Ala.Temp.R.Crim.P., governs this case; it read, in part, as follows:

> "(a) In all capital cases (criminal cases in which the defendant is charged with a death penalty offense), the court reporter shall take full stenographic notes of the arguments of counsel whether or not such is ordered by the judge or requested by the prosecution or defense. This duty may not be abrogated by the judge or waived by the defendant."

(Emphasis added.)

Under Temporary Rule 21(a), there was no requirement that the voir dire examination of the jury be stenographically recorded; and the requirement that the court reporter take "full stenographic notes" of "the arguments of counsel" -- which appeared in Temporary Rule 21(a) and also appears in the current Rule 19.4(a) -- does not require the court reporter to transcribe every incidental discussion between counsel and the trial judge that occurs at the bench unless counsel so requests or the court so directs. Instead, the phrase "arguments of counsel" refers to opening and closing arguments of counsel. See, e.g., Ex parte Godbolt, 546 So.2d 991 (Ala. 1987); Webb v. State, 539 So.2d 343 (Ala.Crim.App. 1987); Reeves v. State, 518 So.2d 168 (Ala.Crim.App. 1987); see Ala. Code 1975, § 12-17-275.

In this case, the items or statements omitted from the record were not transcribed because they occurred out of the hearing of the court reporter. However, Harris's trial counsel had moved the

trial court to "order the official court reporter to record and transcribe all proceedings in all phases [of the case], including pretrial hearings, legal arguments, voir dire and selection of the jury, in-chambers conferences, any discussions regarding jury instructions, and all matters during the trial and in support thereof ..."; and the court had granted the motion. After granting the motion, the court had the duty to see that the entire proceedings were transcribed; we must conclude that the failure to record and transcribe a portion of the voir dire examination of the jury and certain portions of the bench conferences, in light of the fact that Harris was represented on appeal by counsel other than the attorney at trial, constituted error. See Ex parte Godbolt, 546 So.2d 991 (Ala. 1987).[1] Thus, the question becomes whether that error constituted reversible error.

> "'When, [as in this case], a criminal defendant is represented on appeal by counsel other than the attorney at trial, the absence of a substantial and significant portion of the record, even absent any showing of specific prejudice or error, is sufficient to mandate reversal. The wisdom of this rule is apparent. When a defendant is represented on appeal by the same attorney who defended him at trial, the court may properly require counsel to articulate the prejudice that may have resulted from the failure to record a portion of the proceedings. Indeed, counsel's obligation to the court alone would seem to compel him to initiate such disclosure. The attorney, having been present at trial, should be expected to be aware of any errors or improprieties which may have occurred during the portion of the proceedings not recorded. But when a defendant is

[1]Neither Temporary Rule 21, Ala.Temp.R.Crim.P., nor Rule 19.4, Ala.R.Crim.P., was in effect when this Court decided Ex parte Godbolt, Nonetheless, the rationale of Ex parte Godbolt is applicable to the facts of this case.

represented on appeal by counsel not involved at trial [as in this case], counsel cannot reasonably be expected to show specific prejudice. To be sure, there may be some instances where it can readily be determined from the balance of the record whether an error has been made during the untranscribed portion of the proceedings. Often, however, even the most careful consideration of the available transcript will not permit us to discern whether reversible error occurred while the proceedings were not being recorded. In such a case, to require new counsel to establish the irregularities that may have taken place would render illusory an appellant's right to [have the reviewing court] notice plain errors or defects....

"'We do not advocate a mechanistic approach to situations involving the absence of a complete transcript of the trial proceedings. We must, however, be able to conclude affirmatively that no substantial rights of the appellant have been adversely affected by the omissions from the transcript. When ... a substantial and significant portion of the record is missing, and the appellant is represented on appeal by counsel not involved at trial, such a conclusion is foreclosed....'"

Ex parte Godbolt, 546 So.2d at 997. (Citations omitted; emphasis added.) (Quoting with approval United States v. Selva, 559 F.2d 1303, 1305-06 (5th Cir. 1977)).

We have carefully reread those portions of the record where each omission occurred and have reread the several pages before and the several pages after those omitted portions, to ascertain, if possible, the content and substance of the discussions not transcribed, so as to determine whether "a substantial and significant portion of the record" is missing and to determine whether we could "conclude affirmatively that no substantial rights of [Harris] have been adversely affected by the omissions from the transcript." Id.

From this extensive review, and given the particular facts of this case, we have concluded that the untranscribed portions of the proceedings did not constitute "a substantial and significant portion of the record" and we have "conclud[ed] affirmatively that no substantial rights of [Harris] have been adversely affected by the omissions from the transcript." Rather, we have concluded that the trial court's rulings related to certain omitted portions of the proceedings were adverse to the state and that the content or substance of the other discussions that occurred out of the hearing of the court reporter was general in nature and had no effect on the outcome of the case. We conclude, under the facts of this case, that the error in failing to ensure that the entire proceedings were transcribed was harmless. Therefore, Harris's conviction was properly affirmed.

We note for the Bench and Bar that our holding that the failure to ensure a complete transcript of the proceedings was harmless error is strictly limited to the facts of this case and to the record before us; we are not to be understood as holding that in all cases such an error will be considered harmless. Rather, each case will be limited to and determined on its own facts.

AFFIRMED.

Hornsby, C. J., and Maddox and Shores, JJ., concur.

Almon, J., concurs in the result.

Adams, J., dissents.

Ex parte Louise Harris (In re: Louise Harris v. State)

ADAMS, JUSTICE (dissenting).

I must respectfully dissent from the majority opinion. In my view, the defendant, under Alabama law as it has developed since Batson v. Kentucky, 476 U.S. 79 (1986), was entitled to require the prosecutor to explain the reasons for her peremptory challenges of black veniremembers. The venire consisted of 17 black members and 33 white members. During the selection process, the prosecutor challenged 12 of the black veniremembers with her 19 allotted peremptory strikes. Thus, she challenged 71% of the black veniremembers, but only 21% of the white veniremembers.

These facts, standing alone, are sufficient to raise an inference of discrimination, but the inference is further strengthened by an additional fact. As the Court of Criminal Appeals observed, this prosecutor "has a history of using peremptory challenges to discriminate against black jurors." Harris v. State, [Ms. 3 Div. 332, June 12, 1992] ___ So. 2d ___ (Ala. Crim. App. 1992) (quoting Hood v. State, 598 So. 2d 1022, 1024 (Ala. Crim. App. 1991)). "An example of what appears to be a systematic practice of discrimination is a relevant factor to be considered both at the trial level and on review in assessing the strength of the defendant's prima facie case." Ex parte Bird, 594 So. 2d 676, 681 (Ala. 1991).

Notwithstanding these factors, the Court of Criminal Appeals determined that the defendant had failed to present a prima facie

case of racial discrimination in jury selection, and, consequently, that the prosecutor was not required to justify her challenges. That court's disposition of this issue is inexplicable and erroneous, as is this Court's majority opinion, which, sub silentio, concurs in that court's conclusion.

The readiness of the judiciary to guard against inroads into constitutional guarantees must not depend on its assessment of the merits of the underlying case. I cannot, therefore, justify the conclusion that the facts presented by the defendant do not require us to remand this cause for further proceedings at which the State would be required to explain its challenges. Consequently, I must respectfully dissent.

ATTACHMENT B

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1993-94

1920374

Ex parte Louise Harris

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(In re: Louise Harris

v.

State of Alabama)

(Montgomery Circuit Court, CC-88-1237;
Court of Criminal Appeals, 3 Div. 332)

On Application for Rehearing

PER CURIAM.

The issues raised on application for rehearing have been resolved by Ex parte Giles, [Ms. 1920375, October 29, 1993] ___ So.2d ____ (Ala. 1993). The application is overruled.

APPLICATION OVERRULED.

Maddox, Almon, Shores, Adams, Houston, Steagall, and Ingram, JJ., concur.

ATTACHMENT C

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1991-92

3 Div. 332

Louise Harris

v.

State

Appeal from Montgomery Circuit Court
(CC-88-1237)

McMILLAN, JUDGE

The appellant was indicted for two counts of capital murder in the murder of Isaiah Harris: murder for pecuniary gain or pursuant to a contract for hire and murder of a deputy sheriff while the deputy was on duty. Following the introduction of the State's evidence, the appellant moved that the second count of the

indictment be dropped, because, he argues, the State failed to prove that Harris was on duty at the time of the offense. The trial court granted this motion, and the case went to the jury only on the first count of the indictment. The jury found the appellant guilty as charged in the first count of the indictment and recommended that she be sentenced to life imprisonment without the possibility of parole, seven jurors voting for life without parole and five voting for death by electrocution. Thereafter, a sentencing hearing was held before the trial court, after which the court ordered that the appellant be sentenced to death by electrocution.

The record indicates that the appellant was involved in an affair with Lorenzo McCarter, a codefendant, while she was married to Harris. The appellant and Harris had experienced marital problems in the past, which the victim apparently believed he had solved when he promised to buy the appellant a house. The record indicates that the appellant asked McCarter to hire someone to kill her husband. McCarter approached a co-employee about doing "the job"; however, the co-employee refused and told his supervisor about the solicitation. McCarter then approached Michael Sockwell and Alex Hood, other codefendants, to commit the offense. McCarter knew that Sockwell owned a gun. Prior to the offense, the appellant met with the three men and was shown the gun. Sockwell and Hood were paid $100 in advance to commit the offense, with the promise that more money would be paid upon completion of the murder. The State presented evidence of the existence of various

insurance policies on the victim's life, with the appellant specified as the beneficiary.

The victim, who worked the night shift as a jailer, left his home at approximately 11:00 p.m. to go to work, after being awakened by the appellant a little later than usual. Immediately after Harris left home, the appellant paged McCarter on his beeper, giving the message that her husband was leaving. There was evidence that the appellant had paged McCarter on his beeper many times in the past to arrange liaisons. When he received the message in the instant case, McCarter was seated in Hood's car, located across the street from the entrance to the subdivision in which Harris and appellant lived. Also present in the car were Alex Hood and Freddie Patterson. Patterson was unaware of the conspiracy. Sockwell was hidden behind the hedge located at the entrance to the subdivision. Harris was driving to work in his own 1979 black Ford Thunderbird automobile. When Harris stopped at the stop sign at the entrance of the subdivision, Sockwell shot him once in the face at close range with a shotgun. As a result, the lower half of the victim's face was blown off, leaving his teeth, tongue, and "matter" from his face blown across the car. After the shot, the victim's vehicle traveled slowly across the highway and came to a stop in a ditch.

When the victim failed to arrive at work by 11:25 p.m., a co-employee telephoned his home twice and spoke with the appellant. There was testimony that the appellant offered no assistance and that her speech was slow or sluggish. Two men, returning from

work, discovered the victim's body shortly after midnight and telephoned the Montgomery Police Department. After the police arrived at the scene and identified the victim, several officers of the police department and employees of the Montgomery County Sheriff's Department went to the house of the victim and the appellant to notify the appellant of the victim's death. There was testimony that, upon being notified of the victim's death, the appellant began screaming and sobbing, but she shed no tears. Moreover, she became completely calm instantly in order to answer questions. A member of the Montgomery County Sheriff's Department, who knew both the appellant and the victim, testified that she asked the appellant why she did not appear to be upset, and that the appellant responded that she and the victim had been experiencing marital problems for some time. She also told the witness that she had engaged in several extramarital affairs, the current one being with Lorenzo McCarter. The appellant stated that she was in love with McCarter. In response to questions asked by an investigator with the sheriff's department, she responded that McCarter's car was broken down in the vicinity, and when asked if McCarter could have killed the victim, the appellant responded, "If he did kill him I didn't tell him to." At trial, McCarter elected to testify against the appellant, in exchange for the prosecutor's promise not to seek the death penalty in his case.

I

The appellant argues that the trial court erred in removing her appointed attorneys from the case when they sought "reasonable

compensation" for representing her as a capital defendant. She further alleges error in the fact that she was not present at the hearing at which they were dismissed. A hearing was held on counsel's motion, during which appointed counsel requested that they receive $90 per hour or that they be excused. Although these appointed attorneys indicated that they preferred not to be excused from the appellant's case, the trial judge stated that because he was without authority to authorize higher compensation, he would relieve the attorneys of their appointment. The attorneys did not object. This matter was never raised again, either by the attorneys or by the appellant at any time prior to this appeal. See Fisher v. State, 587 So.2d 1027 (Ala.Cr.App.), cert. denied, 587 So.2d 1039 (Ala. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1486, 117 L.Ed.2d 628 (1992) ("The appellant refers to § 15-12-21(d), Code of Alabama 1975, which states that compensation for appointed counsel's trial preparation is limited to $1,000, at a rate of $20 an hour. The record contains no request by appellant or his counsel for additional fees, nor were any claims made concerning the constitutionality of this statute. Therefore, this matter is waived on appeal.") Although the failure to object during a capital case does not preclude review of the alleged error, such failure weighs against a finding of error. Kuenzel v. State, 577 So.2d 474, 523 (Ala.Cr.App. 1990), affirmed, 577 So.2d 531 (Ala. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 242, 116 L.Ed.2d 197 (1991).

According to § 15-12-21, Code of Alabama 1975:

"(a) If it appears to the trial court that such defendant is entitled to counsel, that such defendant does not expressly waive the right to assistance of counsel and that such defendant is not able financially or otherwise to obtain the assistance of counsel, the court shall appoint counsel to represent and assist the defendant; and it shall be the duty of such appointed counsel, as an officer of the court and as a member of the bar, to represent and assist said defendant.

"....

"(d) Counsel appointed in cases described in subsections (a), (b), and (c) above ... shall be entitled to receive for their services a fee to be approved by the trial court. The amount of such fee shall be based on the number of hours spent by the attorney in working on such case and shall be computed at a rate of $40.00 per hour for time expended in court and $20.00 per hour for time reasonably expended out of court in the preparation of such case. The total fees to any one attorney in any case, from the time of appointment through the trial of the case, including motions for new trial, shall not, however, exceed $1,000.00, except as follows: In cases where the original case involves a capital offense or a charge which carries a possible sentence of life without parole, the limit shall be $1,000.00 for out-of-court work, plus payment for all in-court work, said work to be billed at the aforementioned rates. Counsel shall also be entitled to be reimbursed for any expenses reasonably incurred in such defense to be approved in advance by the trial court. Retrials of a case shall be considered a new case."

In Ex parte Grayson, 479 So.2d 76, 79-80 (Ala. 1985), cert. denied, 474 U.S. 865 (1985), the appellant argued that Alabama's system of compensation for appointed counsel denied him of his rights to due process and equal protection of the laws, because of its application to capital cases. Apart from his equal protection argument, the appellant argued "that a capital defendant can not have effective assistance of counsel and, therefore, is deprived of liberty without due process, with such a limit on the amount to be

paid to counsel." Id. at 79. The Alabama Supreme Court held adversely to the appellant on both issues, stating:

> "These contentions are made on the premise that lawyers will not provide effective assistance unless paid a certain amount of money. But the legal profession requires its members to give their best efforts in 'advancing the "undivided interest of [their] client[s]."' Polk County v. Dodson, 454 U.S. 312, 318-19, 102 S.Ct. 445, 449-50, 70 L.Ed.2d 509 (1981). This Court, in Sparks v. Parker, 368 So.2d 528, 530 (Ala. 1979), quoted the New Jersey Supreme Court as follows:
>
> > "'We know of no data to support a claim that an assigned attorney fails or shirks in the least the full measure of an attorney's obligations to a client. Our own experience, both at the bar and on the bench, runs the other way. A lawyer needs no motivation beyond his sense of duty and his pride. [State v. Rush, 46 N.J. 399, 405-07, 217 A.2d 441, 444-45 (1966).]'
>
> "We reaffirm this belief that attorneys appointed to defend capital clients will serve them well, as directed by their consciences and the ethical rules enforced by the state bar association. The counsel compensation statute, § 15-12-21, then, does not deprive petitioner of due process and equal protection of the laws."

Ex parte Grayson, supra, at 79-80 (emphasis added in Grayson). Thus, the Alabama Supreme Court has determined that the compensation statute does not deprive a defendant of his right to due process, and because this court is bound by the decisions of the Alabama Supreme Court, see Scott v. State, 570 So.2d 813, 816 (Ala.Cr.App. 1990), we find no constitutional error in the trial court's granting of the appellant's attorneys' request to be removed from the case if they could not be paid salaries in excess of the statutory limit.

The appellant also argues that it was error for the trial court to conduct the hearing in which the appellant's original

trial counsel were removed in her absence. The appellant argues that, as a defendant, she was entitled to be present during every stage, including every pretrial matter, of her trial. In Johnson v. State, 335 So.2d 663, 671-72 (Ala.Cr.App.), cert. denied, 335 So.2d 678 (Ala. 1976), cert. denied, 429 U.S. 1026 (1976), the defendant argued that the trial court erred in overruling his motion to be present at the hearing of his preliminary pretrial motions. This court held:

> "Preliminary motions hearings and pretrial motions hearings are not viewed by this Court as a 'critical stage' of the trial. Berness v. State, 263 Ala. 641, 83 So.2d 613. 23 C.J.S. § 974 states in pertinent part:
>
> > "'The trial does not embrace every procedural and administrative step and judicial examination of every issue of fact and law during the trial, and accused's presence is not necessary during proceedings which are no part of the trial, such as preliminary or formal proceedings or motions which do not affect his guilt or innocence....
> >
> > "'It has been held that accused's presence is not necessary at the hearing and determination of a demurrer to the indictment or information, of a motion to quash the same, of a plea in abatement, or of a motion for leave to file an information, or to summon witnesses, or to amend the information ... or of other motions....
> >
> > "'... Thus, the exclusion of accused during conferences of court and counsel on questions of law, at the bench or in chambers, has been considered not to constitute a denial of the right of accused to be present at every stage of the trial....' (Footnotes omitted.)
>
> "Also see: State v. Neal, 350 Mo. 1002, 169 S.W.2d 686; Rosebud County v. Flinn, 109 Mont. 537, 98 P.2d 330."

See also Maund v. State, 361 So.2d 1144 (Ala.Cr.App. 1978) (wherein this court rejected the defendant's argument that it was error for a pretrial hearing on a motion to disclose the State's evidence to

have been held in defendant's absence, holding that pretrial hearings are not a "critical stage" of a trial at which a defendant has a right to be present).

Similarly, federal cases have construed Rule 43 of the Federal Rules of Criminal Procedure, which provides that a defendant must be present at every stage of his trial, to be inapplicable where the "privilege" of presence would be of no real benefit to the defendant. See Peterson v. United States, 411 F.2d 1074 (8th Cir. 1969), cert. denied, 396 U.S. 920 (1970). See also Stein v. United States, 313 F.2d 518 (9th Cir. 1962), cert. denied, 373 U.S. 918 (1963) (the presence of a defendant, to be required, must bear a reasonable substantial relation to the opportunity to defend, because the constitution does not assure the privilege of presence when presence would be useless).

The question remains whether a distinction should be made when the case is a capital case. In Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), cert. denied, 464 U.S. 1002 (1983), the court applied a stricter no-waiver rule to the right of presence for a capital defendant, the rule for a noncapital defendant, in federal court, being the "knowing-and-voluntary-consent requirement" to waiver. However, in determining a capital, as opposed to noncapital, defendant's rights pertaining to waiver of presence, the court began with the same analysis used in Johnson v. State, supra, that the hearing must be a critical or a central part of the trial. The court reasoned:

> "A defendant's right ~~to be~~ present at all stages of a criminal trial derives from the confrontation clause of

the Sixth Amendment and the due process clause of the Fourteenth Amendment. Illinois v. Allen, 397 U.S. 337, 338, 90 S.Ct. 1057, 1058, 25 L.Ed.2d 353 (1970); Hopt v. Utah, 110 U.S. 574, 579, 4 S.Ct. 202, 204, 28 L.Ed. 262 (1884). This right extends to all hearings that are an essential part of the trial -- i.e., to all proceedings at which the defendant's presence 'has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge.' Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934). Compare Hopt v. Utah, supra (defendant has right to be present at empaneling of jurors); Bartone v. United States, 375 U.S. 52, 84 S.Ct. 21, 11 L.Ed.2d 11 (1963) (court cannot impose sentence in absence of defendant); with United States v. Howell, 514 F.2d 710 (5th Cir. 1975); cert. denied, 429 U.S. 838, 97 S.Ct. 109, 50 L.Ed.2d 105 (1976) (no right to be present at in camera conference concerning attempted bribe of juror); United States v. Gradsky, 434 F.2d 880 (5th Cir. 1970), cert. denied, 409 U.S. 894, 93 S.Ct. 203, 34 L.Ed.2d 151 (1971) (right to presence does not extend to evidentiary hearing on suppression motion.) We have already held that the penalty phase is an integral part of a capital trial for purposes of cross-examination. See text supra at 35-41. For similar reasons, we conclude that the capital defendant's interest in attending his sentencing hearing is as great as his interest in being present at the guilt determining stage. Cf. Gardner v. Florida, 430 U.S. at 358, 97 S.Ct. at 1204 (sentencing is 'critical stage' of capital trial). Hence we hold that the right to be present extends to the sentencing as well as the guilt portion of a capital trial."

Id. at 1256-57. But see Adams v. State, 28 Fla. 511, 10 So. 106 (1891).[1]

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[1] In Adams v. State, supra, the court held that the judge committed reversible error by removing the defendant in a murder trial from the courtroom during a discussion between trial judge and counsel, in the jury's absence, regarding a witness's competency. The court held that a defendant has the right to be present, and must be present, during the trial of a capital case; thus no action by the trial court may occur in a defendant's absence, because his right to be present extends to discussions of questions of law as well as questions of fact. The court held that the trial judge's offer to repeat the argument in the defendant's presence could not possibly ~~have~~ restored the accused to the position of hearing what had been said in his absence.

The court in Proffitt v. Wainwright, supra, acknowledged in a footnote that in Snyder v. Massachusetts, 291 U.S. 97 (1934), "which was a capital case, [the Court] stated that the sixth amendment privilege of confrontation could 'be lost by consent or at times even by misconduct.' Snyder v. Massachusetts, 291 U.S. at 106, 54 S.Ct. at 332." Proffitt v. Wainwright, supra, at 1257, n. 43. See also State v. Davis, 290 N.C. 511, 227 S.E.2d 97, 110 (1976) ("[t]he strict rule that an accused cannot waive his right to be present at every stage of his trial upon an indictment charging a capital felony, State v. Moore, 275 N.C. 198, 166 S.E.2d 652 (1969), is not extended to require his presence at the hearing of a pretrial motion for discovery when he is represented by counsel who consented to his absence, and when no prejudice resulted from his absence"). See also State v. Piland, 58 N.C.App. 95, 293 S.E.2d 278 (1982), appeal dismissed, 306 N.C. 562, 294 S.E.2d 374 (1982) ("[t]he [capital] defendant in this case has not demonstrated any prejudice to him by his absence from a part of the hearing. The evidence elicited was not disputed and there has been no showing that it would have been different had the defendant been present").

Thus, if the appellant's presence, in the present case, would have been useless to her defense and if the hearing was not considered to be a "critical stage" of her trial, then we can find no error in the appellant's absence from the hearing. In Lowery v. Cardwell, 535 F.2d 546 (9th Cir. 1976), the court held the record before it to be insufficient to determine whether the doctrine of

fundamental fairness required the defendant's presence at an in-chambers conference during which the defense counsel sought to withdraw from the case. This conference occurred during trial and was based on the defense counsel's belief that the defendant had lied on the witness stand. The court remanded the case for a hearing to determine the defense counsel's reasons for his motion to withdraw and the details of what had occurred during this conference. On remand, the court disclosed the defense counsel's reasons for seeking to withdraw and stated that the only other matter discussed during the hearing concerned the length of the trial. No error was found in the trial court's action in conducting the hearing outside the defendant's presence. Lowery v. Cardwell, 575 F.2d 727 (9th Cir. 1978). Similarly, in the present case, the trial court's decision to allow the appellant's trial counsel to be removed from the case was based on a question of law, the dictates of a statute, a matter concerning which the appellant's presence would be useless. As noted in Proffitt v. Wainwright, supra, a defendant's right to be present arises from his right to confrontation and, in the present case, no witnesses were involved in this hearing. The appellant has been unable to suggest or demonstrate any possibility of prejudice resulting from her absence. Therefore, we find no error in this matter.

II

The appellant argues that her conviction is due to be reversed because, she argues, the prosecutor used her peremptory strikes in a racially discriminatory manner ~~and~~ then refused to give reasons

for those strikes. The record indicates that, in making his objection pursuant to Batson v. Kentucky, 476 U.S. 79 (1986), defense counsel alleged that there were 17 black veniremembers on a panel of 51, and that the prosecutor used 11 of her 19 strikes to remove blacks. The prosecutor responded that the appellant had failed to make a prima facie showing pursuant to Batson v. Kentucky, supra. She stated that in Montgomery County, the black population constituted approximately 40% of the general population. She noted that of the 14 jurors, which included the 2 alternates, 8 were white and 6 were black. Of the two alternates, one was white and one was black. She concluded that, of the original 12 jury members, 7 would be white and 5 black, which would make the black percentage of representation on the jury over 40%. Defense counsel responded, stating that, because the prosecutor used 11 of her 19 strikes against blacks, she should have to show some reason for doing so. The trial court denied the appellant's motion.

In a companion case, which was tried by the same prosecutor in the same county, this court addressed this same claim under a basically identical factual situation. In Hood v. State, [Ms. 90-770, December 27, 1991] ___ So.2d ___ (Ala.Cr.App. 1991), the trial court found that the defendant failed to make a prima facie showing under Batson that the State had used its peremptory challenges in a discriminatory manner. In that case, the jury venire consisted of 44 veniremembers, 15 of whom were black. The prosecutor exercised 10 of her 16 peremptory challenges against black veniremembers, resulting in a ~~jury~~ composed of 5 blacks and 7

whites. In that case, as in the present case, the defendant "relied only on the number of blacks struck by the State. Defense counsel did not bring to the circuit court's attention any other factor which might tend to show that the prosecutor purposefully discriminated against potential jurors on the basis of race." In Hood v. State, this court relied on the following language in Harrell v. State, 571 So.2d 1270 (Ala. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 1641 (1991):

> "[A] defendant cannot prove a prima facie case of purposeful discrimination solely from the fact that the prosecutor struck one or more blacks from the jury. A defendant must offer some evidence in addition to the striking of blacks that would raise an inference of discrimination. When the evidence shows only that blacks were struck and that a greater percentage of blacks sat on the jury than sat on the lawfully established venire, an inference of discrimination has not been created. Logically, if statistical evidence may be used to establish a prima facie case of discrimination, by showing a discriminatory impact, then it should also be available to show the absence of a discriminatory purpose."

Id. at 1271-72. This court, in Hood v. State, supra, stated:

> "Although both this court and the Alabama Supreme Court have observed that the assistant district attorney who prosecuted the appellant has a history of using peremptory challenges to discriminate against black jurors, see Ex parte Bird & Warner, [Ms. 89-1061 and 89-1062, December 6, 1991] ___ So.2d ___ (Ala. 1991), that history, standing alone, does not establish a prima facie case for the defense in any given case. Compare Ex parte Harrell, 571 So.2d at 1272 (past conduct of the prosecutor, in connection with other facts relating to the particular venire, is relevant in determining whether an inference of discrimination exists); Ex parte Bird & Warner, ___ So.2d at ___ ('evidence [of past history], in conjunction with the disparate impact of the peremptory strikes in this case, ... raises an inference of discriminatory intent'). In this case, the prosecutor did not state any reason for striking any member of the venire. Under these circumstances, Harrell dictates that we uphold the trial court's determination that the appellant did not establish a prima facie case under Batson and Ex parte Branch, 526 So.2d 609 (Ala. 1987), for the following reasons: (1) the trial court was presented with no evidence of alleged discrimination other than the number of blacks struck by the State, and (2) the peremptory striking process did not have a disparate impact upon the number of blacks empaneled as jurors. Instead, the process resulted in a jury of proportionately more black citizens than the venire from which it was selected."

Because the same relevant facts and law apply to the present case, as those pertinent to this court's holding in Hood v. State, supra, we find that the trial court properly held that the appellant failed to make a prima facie showing of purposeful discrimination in the prosecutor's use of peremptory challenges against blacks.

III

The appellant argues that she was charged under a duplicitous indictment and that the trial court erred in failing to give the jury a unanimity instruction. Specifically, the appellant argues that the jury was improperly charged that all 12 had to agree that the appellant committed murder "either for pecuniary gain or pursuant to a contract or for hire in order to find her guilty of capital murder." The appellant acknowledges that such an instruction tracks the language of the indictment, but she argues that this instruction, and the indictment on which it was based, allowed her to be convicted of capital murder by a nonunanimous jury. She argues that "some of the jurors [might have] believed she had hired one or more men to kill her husband, while" others might have believed she had committed the murder for reasons of

pecuniary gain, thus allegedly resulting in a non-unanimous verdict.

The record indicates that the count of the indictment that went to the jury charged that the defendant did "intentionally cause the death of Isaiah Harris by shooting him with a shotgun for pecuniary or other valuable consideration or pursuant to a contract or for hire in violation of Section 13A-5-40 of the Code of Alabama 1975 as amended." Pursuant to Section 13A-5-40(a)(7), Code of Alabama 1975 murder is made capital if it is "done for a pecuniary or other valuable consideration or pursuant to a contract or for hire."

> "A way of framing the issue is suggested by analogy. Our cases reflect a long-established rule of the criminal law that an indictment need not specify which overt act, among several named, was the means by which a crime was committed. In Andersen v. United States, 170 U.S. 481 (1898), for example, we sustained a murder conviction against the challenge that the indictment on which the verdict was returned was duplicitous in charging that theft occurred through both shooting and drowning. In holding that 'the Government was not required to make the charge in the alternative,' id., at 504, we explained that it was immaterial whether death was caused by one means or the other. Cf. Borum v. United States, 284 U.S. 596 (1932) (upholding the murder conviction of three co-defendants under a count that failed to specify which of the three did the actual killing); St. Clair v. United States, 154 U.S. 134, 145 (1894). This fundamental proposition is embodied in the Federal Rules of Criminal Procedure 7(c)(1), which provides that '[i]t may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means.'"

Schad v. Arizona, ___ U.S. ___, 111 S.Ct. 2491 (1991). See Thompson v. State, 542 So.2d 1286 (Ala.Cr.App. 1988), affirmed, 542 So.2d 1300 (Ala. 1989), cert. denied, 493 U.S. 874 (1989) (wherein the indictment charged that the defendant caused the victim's death

"by striking her with his fist and by dragging her behind an automobile, either or both of which acts resulted in the aspiration of stomach contents and suffocation"). See also Boulden v. State, 278 Ala. 437, 179 So.2d 20 (1965) (wherein the court found counts of the indictment that "charge in the alternative the means by which the offense was committed," i.e., that the victim "died as a result of bullet wounds inflicted by a pistol or pistols or by a gun or guns, or as a result of cuts inflicted by use of a knife or other sharp instrument," were proper).

> "In effect, the indictment charged, in a single count, alternative methods of proving the same crime. See Sisson v. State, 528 So.2d 115 (Ala.Cr.App. 1987), affirmed, Ex parte State, 528 So.2d 1159 (Ala. 1988) ('Section 32-5A-191(a)(1) and (2) are merely two different methods of proving the same offense -- driving under the influence.') 'When an offense may be committed by different means or with different intents, such means or intents may be alleged in an indictment in the same count in the alternative.' Alabama Code 1975, § 15-8-50. Chappell v. State, 52 Ala. 359, 360-61 (1875), held that in an indictment for common law robbery, the taking of the property from the victim may be charged to have been 'against his will, by violence to his person' or 'by putting him in such fear as [to cause him] unwillingly to part with the same' in different counts or in the same count in the alternative."

Williams v. State, 538 So.2d 1250, 1252 (Ala.Cr.App. 1988). Thus, in Tucker v. State, 537 So.2d 59 (Ala.Cr.App. 1988), this court held that an indictment that charged the capital murder of a police officer in alternative language complied with the statutory language of § 13A-6-2(a)(1) and § 13A-5-40(a)(5), Code of Alabama 1975. By statutory definition, the murder of a police officer is made capital when the officer is intentionally killed "while such

officer is on duty" or "because of some official or job-related act or performance." This court reasoned:

> "'An apparent purpose of these several provisions [§ 15-8-50, 51, 52] is to obviate the necessity of a multiplicity of counts, permitting one count to serve the purposes accomplished by several at common law....' Horton v. State, 53 Ala. 488, 492 (1875). The indictment was properly framed to conform to the proof. It charged only one offense -- capital murder of a peace officer -- which was committed for one of two reasons: either because the officer was trying to arrest Tucker's step-mother or because the officer was trying to arrest Tucker. This indictment completely satisfied the constitutional requirements of due process. Summers v. State, 348 So.2d 1126, 1132 (Ala.Cr.App.), cert. denied, Ex parte Summers, 348 So.2d 1136 (Ala. 1977), cert. denied, 434 U.S. 1070, 98 S.Ct. 1253, 55 L.Ed.2d 773 (1978). See Davis v. State, 505 So.2d 1303, 1304 (Ala.Cr.App. 1987) (operating a motor vehicle 'while under the influence of intoxicating liquors or narcotic drugs'); Wilson v. State, 84 Ala. 426, 4 So. 383 (1888) (murder 'by striking him in the head ... or by choking him with a piece of ... cord'); King v. State, 137 Ala. 47, 34 So. 683 (1903) (murder 'by hitting him or by striking him with a miner's pick, or by stabbing or cutting him with a knife, or with some sharp instrument')."

Tucker v. State, supra, at 61.

As in Tucker v. State, supra, in the present case, the indictment in the present case charged only one offense -- capital murder for hire -- which was committed for one of two reasons: either Isaiah Harris was killed pursuant to a contract in order for Louise Harris and Lorenzo McCarter to continue their relationship, or Isaiah Harris was killed pursuant to a contract in order for the perpetrators to secure pecuniary gain, specifically $100 paid by Louise Harris and the proceeds of certain insurance policies on the victim's life, which were to be divided among all the participants. Thus, the indictment was not duplicitous.

Moreover, the trial court's charge concerning jury unanimity were proper. The trial court instructed the jury that it had to reach a unanimous verdict. The appellant argues that because the trial court charged the jurors that all 12 must agree as to one of three possible verdicts -- guilty of the capital offense, guilty of lesser-included offense, or not guilty -- the trial court's instructions were improper. Specifically, the appellant argues that the instruction was error because it did not require the unanimity as to one of the alternative theories of the capital offense, i.e., murder for hire, murder pursuant to a contract, or murder for pecuniary gain. However, because we have previously concluded that the jury did not have to decide between this alternative language, the trial court committed no error in its instructions. See Schad v. Arizona, supra (it was constitutionally permissible for the jurors to agree on a unanimous verdict based on any combination of the alternative means to a single offense. 59 U.S.L.W. at 4763-68).

IV

The appellant argues that the holding of "various proceedings" outside her presence violated her right to a fair trial and determination of punishment, as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by Alabama law. The appellant cites a number of pretrial proceedings at which she alleges that she was not present. The State submits that the record affirmatively shows that the appellant was present at each proceeding, except at the hearing at which her initial

trial counsel was removed (see Part I) and during a hearing on a motion to produce. The appellant cites three additional hearings from which she was absent, each of which addressed a number of subjects, and each of which was held in chambers; these hearings were held on March 8, 1989; April 10, 1989; and April 19, 1989, respectively. The record notes that Ellen Brooks (assistant district attorney), James H. Evans (district attorney), David Vickers, Knox Argo, and Barry Leavell were present at the first hearing. No mention is made of the appellant's presence. As to the second hearing, the record fails to specifically note who was present; however, during the course of the hearing, it is clear that Knox Argo, Eric Bowen, Ellen Brooks, and Ms. Baker were present. At the third hearing, the record indicates that James H. Evans, David Vickers, and Eric Bowen were present. There is no indication that the appellant was present at these latter two hearings, and we are unable to glean from the conversations during the hearings whether the appellant was present.

As to these pretrial hearings, which the appellant argues were held in her absence and at which the State argues the appellant was present, it should be noted that this court ordinarily will not presume error from a silent record. Atchison v. State, 565 So.2d 1186. However, even assuming that the record's failure to mention the appellant's presence indicates that she was in fact not present, we find no error in her absence during these hearings. The particular matters raised during these hearings, which the appellant argues required her presence in order to aid her counsel,

were discussions of a public trial, evidentiary plans of the State, defense motions for the State to produce any statements allegedly made by the appellant, a defense motion requesting criminal records on certain State's witnesses,[2] and a brief rendition by the State of what it anticipated its case and evidence would entail. Because the trial court ordered the State to turn over its entire file on this case to the defense, there is no error in the defendant's absence during the State's brief rendition of its evidence, because the appellant could have suffered no prejudice. The other matters involved questions of law, involved no witness testimony, and from the discussions therein, it is clear that the appellant's presence would not have aided his defense. See Maund v. State, supra; People v. Teitelbaum, 163 Cal.App.2d 184, 329 P.2d 157 (1958), cert. denied, 359 U.S. 206 (1959) (wherein there was no error in the holding of eight conferences in chambers, because in none of these proceedings were any matters discussed as to which the defendant could have been of any aid to his counsel, and each concerned only questions of law).

As to the hearing on the appellant's motion to produce, from which the State concedes the appellant was absent, the State argues that defense counsel waived the appellant's right to be present,

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[2] The trial court noted that the prior criminal record of any State's witnesses should be turned over by the prosecutor pursuant to Brady v. Maryland, 373 U.S. 83 (1963). Moreover, the trial court ordered that the State turn over any information on prior convictions of State's witnesses if they were known to them. The trial court also ordered the State's entire file to be turned over to the appellant. Eventually, during the trial, the court allowed defense counsel to ask certain questions of State's witness Freddie Patterson concerning his prior criminal record.

stating that her presence was not necessary to hear the legal arguments. The record indicates that, prior to beginning the hearing, the trial court asked defense counsel, "Do you waive your client's presence here for this hearing?" Defense counsel responded, "Yes, Your Honor. Apparently I'll have to -- she's in the Elmore County jail. I did not have time to get her here." Defense counsel thereafter stated, "Your Honor, I don't think it's necessary for her to be here, to hear legal arguments on this point." During this hearing, the defense requested the production of certain telephone conversations from the appellant's house to the police department. The trial court denied this request as to all the conversations, but ordered the State to turn over any exculpatory material contained in those conversations. The defense also requested the production of tape-recorded statements by the defendant, which request the trial court granted. The defense also asked for production of any statements, including grand jury testimony, of certain State's witnesses who were not accomplices. The trial court denied this request as to all statements, but ordered the State to turn over any exculpatory material contained in the witnesses' statements.

We decline to hold, in the present case, that defense counsel could waive the appellant's right to be present. See Proffitt v. Wainwright, supra.[3] However, because the hearing involved only

[3]In Proffitt v. Wainwright, the court held that the trial court erred in allowing a post-trial sentencing hearing to be conducted in the defendant's absence after a purported waiver of his presence by defense counsel. The court held that, even if it were to follow the cases cited by the State for a departure from

questions of law, the appellant's presence would have been needless. Moreover, in light of the trial court's favorable rulings for the appellant, she was not prejudiced by her absence. See State v. Iverson, 187 N.W.2d 1 (N.D.), cert. denied, 404 U.S. 956 (1971) (wherein, although the court found error in the defendant's absence from four conferences held in chambers, the court held that the error was harmless, emphasizing that in three of the conferences the defendant obtained favorable evidentiary rulings).

V

The appellant argues that the trial court erred in denying her motion for a change of venue. The record indicates that, prior to trial, a hearing was held on the appellant's motion for a change of venue, during which an investigator testified for the appellant. He stated that he had taken a survey of 25 to 30 people in different areas of Montgomery County. He testified that he had driven around the county, stopping at various locations, and that he had attempted to question different type of people. He admitted that his survey was informal and unscientific and that he had no specialized training or polling skills. He testified that his findings revealed that 35% to 40% of the people questioned had a fixed opinion as to the appellant's guilt. The appellant offered no further evidence in support of her motion. This showing was not

the no-waiver rule, at least a "knowing and voluntary consent" would be required and, because the defendant was neither apprised of the hearing nor afforded an opportunity to assert his right to attend, he could not have knowingly or voluntarily waived his right to be present.

sufficient to prove that the community was saturated with prejudicial publicity.

> "Absent a showing of abuse of discretion, a trial court's ruling on a motion for change of venue will not be overturned. Ex parte Magwood, 426 So.2d 929, 931 (Ala.), cert. denied, 462 U.S. 1124, 103 S.Ct. 3097, 77 L.Ed.2d 1355 (1983). In order to grant a motion for change of venue, the defendant must prove that there existed actual prejudice against the defendant or that the community was saturated with prejudicial publicity. Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); Franklin v. State, 424 So.2d 1353 (Ala.Crim.App. 1982). Newspaper articles or widespread publicity, without more, are insufficient to grant a motion for change of venue. Anderson v. State, 362 So.2d 1296, 1298 (Ala.Crim.App. 1978). As the Supreme Court explained in Irvin v. Dowd, 366 U.S. 717, 723, 81 S.Ct. 1639, 1642-43, 6 L.Ed.2d 751 (1961):
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> > "'To hold that the mere existence of any pre-conceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court....'
>
> "The standard of fairness does not require jurors to be totally ignorant of the facts and issues involved. Murphy v. Florida, 421 U.S. 794, 799-800, 95 S.Ct. 2031, 2035-2036, 44 L.Ed.2d 589 (1975). Thus, '[t]he proper manner for ascertaining whether adverse publicity may have biased the prospective jurors is through the voir dire examination.' Anderson v. State, 362 So.2d 1296, 1299 (Ala.Crim.App. 1978)."

Ex parte Grayson, 479 So.2d 76, 80 (Ala. 1985), cert. denied, 474 U.S. 865 (1985).

Moreover, the appellant has failed to prove that there existed any actual prejudice against her. The jurors who indicated that they had any knowledge of the case were questioned individually concerning the extent of their knowledge, the source of that knowledge, and the ability to disregard the information and decide

the case based upon the facts presented in court. No juror remaining on the venire indicated that he or she could not decide the case based on the facts presented and on the law as instructed by the court. Thus, there was no actual prejudice demonstrated by the appellant resulting from pretrial publicity. Irvin v. Dowd, 366 U.S. 717 (1961).

Although the appellant further claims error in the trial court's failure to allow individual voir dire of every potential juror, individual voir dire was undertaken where there was any reason for follow-up, including any indication of pre-trial knowledge of the case. Whether a capital defendant is allowed individual voir dire of each prospective juror is a matter vested within the discretion of the trial court. Hallford v. State, 548 So.2d 526, 538-39 (Ala.Cr.App. 1988), affirmed, 548 So.2d 547 (Ala.), cert. denied, 493 U.S. 945 (1989). We find no abuse of discretion in this case. Kuenzel v. State, 577 So.2d 474, 484 (Ala.Cr.App. 1990), affirmed, 477 So.2d 531 (Ala. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 242, 116 L.Ed.2d 197 (1991).

The appellant also claims that the trial court erred in denying her request to have the venire complete a questionnaire. However, "the trial court has discretion regarding how the voir dire examination of jury will be conducted, and ... reversal can be predicated only upon an abuse of that discretion." Bui v. State, 551 So.2d 1094, 1110 (Ala.Cr.App. 1988), affirmed, 551 So.2d 1125 (Ala. 1989), vacated on other grounds, ___ U.S. ___, 111 S.Ct. 1613

(1991). There was no abuse of discretion by the trial court as to this matter.

The appellant further claims that the trial court erred in failing to ask potential jurors whether any of them had fixed opinions in favor of the death sentence. However, it should be noted that this jury returned a sentence of life without parole, and the rule established in Witherspoon v. Illinois, 391 U.S. 510 (1969), does not apply where the jury does not recommend the death penalty. See Neelley v. State, 494 So.2d 669, 680 (Ala.Cr.App. 1985), affirmed, 494 So.2d 697 (Ala. 1986), cert. denied, 480 U.S. 926 (1987); Bumper v. North Carolina, 391 U.S. 543 (1968). Moreover, because the appellant failed to object to the trial court's failure to question the jurors, this alleged error would have to amount to plain error for the appellant to be entitled to relief. However, this court has held that the failure of the trial court to question potential jurors concerning their views in favor of the death penalty does not constitute plain error. Henderson v. State, 583 So.2d 276 (Ala.Cr.App. 1990), affirmed, 583 So.2d 305 (Ala. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1268, 117 L.Ed. 2d 496 (1992).

VI

The appellant argues that it was error for sheriff's deputies to manage and be in charge of the jurors during their sequestration and deliberations, in light of the fact that the victim was a deputy sheriff. The record reveals that the appellant objected on this ground at trial, and that ~~the~~ trial court responded that the

deputies had long been assigned to court detail and that the trial court was familiar with them. The trial court further stated that the deputies were "well aware of their responsibilities." There is no indication or claim by the appellant of any improper behavior by the deputies in this regard or of any improper communications between the deputies and the jury. Thus, there is no evidence of prejudice to the appellant.

In Holloway v. State, 477 So.2d 487 (Ala.Cr.App. 1985), overruled on other grounds, Ex parte McCree, 554 So.2d 336 (Ala. 1988) a manslaughter case, the defendant argued that because the sheriff and several deputies were witnesses for the State, the trial court should not have allowed the sheriff's department to manage the jury and to sequester them. In that case, this court noted that there was no evidence of prejudice to the defendant. This court held:

> "'Reversible error will not be presumed, but the burden is upon the appellant to show injury in this respect.' Bowens v. State, 54 Ala.App. 491, 309 So.2d 844 (1974), cert. denied, 293 Ala. 746, 309 So.2d 850 (1975).
>
> "Section 12-16-10, Code of Alabama 1975, establishes the duty of the sheriff to provide suitable lodging and meals for members of a sequestered jury. Furthermore, the sheriff and deputies are the proper officers to have charge of the jurors during their deliberations, and that includes the rendering of such services to them as their physical conditions require. Pounders v. State, 55 Ala.App. 204, 314 So.2d 123 (1975)."

Holloway v. State, supra, at 488. Because there is no indication of any prejudice to the appellant in the deputies' overseeing of the jury, we find no error as to this matter.

VII

The appellant argues that the trial court erred in denying her challenges for cause of three veniremembers who indicated that they had knowledge of the case from pretrial publicity, as well as her challenge of another veniremember who knew the victim. Each of the three veniremembers who had knowledge of the case from pretrial publicity was questioned individually by the trial court concerning this knowledge. All three stated that they only remembered the basic facts of the case, and two of the three specifically testified that they tended not to believe what they heard through the media. All three potential jurors stated that they had no doubts that they could render a fair, just, and impartial verdict based on the facts presented in court and the law as instructed by the trial court. The mere knowledge of the facts and issues in this case, as in any case, does not disqualify a potential juror from serving on the case. Kinder v. State, 515 So.2d 55, 59-61 (Ala.Cr.App. 1987). See also Kuenzel v. State, supra, at 483-84. The appellant also alleges error in the trial court's refusal to excuse for cause a potential juror who knew the victim personally and professionally and who was also familiar with the facts and circumstances of the crime. The following transpired during the individual voir dire of this prospective juror:

"THE COURT: [Prospective juror], you had indicated that you had either read or heard or seen something about this matter in the past; is that correct?

"PROSPECTIVE JUROR: Yes, sir.

"THE COURT: Could you, the best you can recall, tell us what you know about it and from what source, what you heard, what you read, what you saw?

"PROSPECTIVE JUROR: Well, mainly, you know, from what I read in newspaper accounts and [television] accounts. Also, Judge, there's one thing I don't think you asked this morning, I don't know the significance of it but it may be, but from a professional point of view I knew Mr. Harris.

"THE COURT: Okay. Can you tell us how you knew him?

"PROSPECTIVE JUROR: He used to bring inmates to Kilby and as a correctional officer we had a relationship there.

"THE COURT: Okay.

"PROSPECTIVE JUROR: And also, two or three, I would think two or three occasions I might have been with him socially.

"THE COURT: Okay. What type of social?

"PROSPECTIVE JUROR: Just, you know, get together like I think he was a retired military, so am I. I think one occasion I met him at the club. Another occasion I think there was some correctional officers getting together. He was on the scene, you know, just for a social affair.

"THE COURT: Do you feel that personal acquaintance with him --

"PROSPECTIVE JUROR: I didn't know him personally, per se. I just, you know, just, as I say, just a relationship we had on those occasions.

"THE COURT: Do you feel like whatever relationship --

"PROSPECTIVE JUROR: No, sir.

"THE COURT: -- You have with him would in any way affect your ability to render a fair, just, and impartial verdict from this case?

"PROSPECTIVE JUROR: No, sir, I don't think it has any bearing. I just wanted to tell you so it wouldn't come up later.

"THE COURT: I appreciate you telling us.

"PROSPECTIVE JUROR: But it had no bearing on my making a judgment fairly, a fair decision.

"THE COURT: Do you recall what you read in the newspaper accounts about this or heard on t.v.?

"PROSPECTIVE JUROR: Just the incident itself.

"THE COURT: What about it?

"PROSPECTIVE JUROR: The fact that they had found his car on the side of the road and, um, he was on his way to work, basically.

"THE COURT: Do you recall anything about who may have been arrested for it, or who was alleged --

"PROSPECTIVE JUROR: Yes, sir, they did indicate at a later date that his wife and some other people, I don't recall the names --

"THE COURT: Ym -- hum.

"PROSPECTIVE JUROR: -- Have been implicated.

"THE COURT: Based on what you may have read or heard do you feel like you'd be able to put that aside and listen only to the facts as you hear them in Court?

"PROSPECTIVE JUROR: Yes, sir.

"THE COURT: And render a fair, just, and impartial verdict?

"PROSPECTIVE JUROR: Yes, sir.

"THE COURT: Do you feel like you'd be tainted in any way based on what you've read or heard in the past about this?

"PROSPECTIVE JUROR: No, sir, none whatsoever.

"THE COURT: So you have no doubt that you can be fair in this case?

"PROSPECTIVE JUROR: Yes, sir."

"The facts that the victim and a prospective juror are personally acquainted and work for the same company do not automatically disqualify a juror for cause (cite omitted).

Employment of the juror by the same company that employed the victim is not a prima facie indication of interest or bias on the part of the juror." Carlton v. State, 415 So.2d 1241, 1242 (Ala.Cr.App. 1982), citing Glenn v. State, 395 So.2d 102, 107 (Ala.Cr.App. 1980), cert. denied, 395 So.2d 110 (Ala. 1981).

> "The grounds on which a juror may be challenged for cause are set out in § 12-16-150, Code of Alabama (1975). ... Furthermore, grounds for challenge for cause under the common law still exist where they are not inconsistent with § 12-16-150. Stewart v. State, 405 So.2d 402, 407 (Ala.Cr.App. 1981); Felton v. State, 46 Ala.App. 579, 246 So.2d 467 (1971); Mullis v. State, 258 Ala. 309, 62 So.2d 451 (1952).
>
> > "'The test to be applied is can the juror eliminate the influence of his scruples and render a verdict according to the evidence. Ordinarily a juror is not disqualified where it appears that he is willing to follow the instructions of law given by the trial court and is able to decide the case impartially according to the evidence notwithstanding his scruples. The determination of this question is based on the juror's answers and demeanor and is within the sound discretion of the trial judge. Tidmore [v. City of Birmingham, 356 So.2d 231 (Ala.Cr.App. 1977), cert. denied, 356 So.2d 234 (Ala. 1978)]. A juror is incompetent whose answers show that he would follow his own views regardless of the instructions of the court. Watwood v. State, 389 So.2d 549, 550 (Ala.Cr.App.), cert. denied, 389 So.2d 552 (Ala. 1980).
>
> "Barbee v. State, 395 So.2d 1128, 1130-31 (Ala.Cr.App. 1981)....
>
> > "'Thus, where a juror states that he has opinions but that he would try the case fairly and impartially according to the law and the evidence and that he would not allow his opinion to influence his decision, it is not error for a trial judge to deny a challenge for cause. Howard v. State, 420 So.2d 828, 831 (Ala.Cr.App. 1982). "A juror who brings his thoughts out into the open in response to voir dire questions may be the one who later 'bends over backwards' to be fair...." Clark v. State, 443 So.2d 1287, 1289 (Ala.Cr.App. 1983).'

"Mahan v. State, 508 So.2d 1180 (Ala.Cr.App. 1986)."

Kinder v. State, 515 So.2d 55, 60-61 (Ala.Cr.App. 1986).

Because this potential juror stated that he would base his decision on the evidence presented at trial and on the judge's instructions as to the law, we find no abuse of discretion by the trial court in denying the appellant's challenge for cause of this potential juror. "A trial court's ruling on challenges for cause based on bias is entitled to great weight and will not be disturbed on appeal unless clearly shown to be an abuse of discretion." Stewart v. State, 405 So.2d 402, 408 (Ala.Cr.App. 1981).

VIII

The appellant argues that the trial court erred in limiting her cross-examination of a State's witness concerning an alleged prior conviction and probationary status, which she contends violated her Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution and Alabama law. The appellant refers to State's witness Alonzo Trimble, who testified that he worked with Lorenzo McCarter and that he was approached by him and solicited to commit the murder.

The record reveals that, during the cross-examination of Trimble, defense counsel asked if the witness was still on probation. The witness responded that he was not. The prosecutor then asked that the question and answer be stricken, as there was "no basis whatsoever for [the defense counsel's] asking that question." The prosecutor indicated that she had no knowledge that the witness had ever been on probation, and defense counsel

responded that the defense had been informed that the witness was on probation. Thereafter, a hearing was held in chambers and the prosecutor again asserted that defense counsel had no basis for his question and was merely conducting a "fishing expedition." When defense counsel was asked by the trial court if he had information that the witness was on probation, he responded:

> "I don't know whether he is or not, Judge. I just don't know. They haven't furnished us a rap sheet on him. [The prosecutor] says she doesn't have it in her file and I believe her, you know. It's our understanding that he's convicted of an offense and was on probation. Maybe it was at the time he gave the statements. Maybe he's not any longer. I don't see why we don't just ask him."

The prosecutor responded that the question had been asked and answered, but complained that the question had implied that he may have been on probation, so the damage had been done. Thereafter, Trimble was called into chambers and asked by the trial court if he had ever been convicted of a crime involving moral turpitude. The witness responded that "they" tried to convict him of "a stolen vehicle"; however, he indicated he was never convicted. The witness then stated that he had been charged with third degree assault in municipal court about three months prior to the instant trial. He responded that those charges were brought after his involvement in the present case. Subsequently, while the parties were still in chambers, an assistant prosecutor asked the witness if he had ever been on probation. The witness responded that he had been on unsupervised probation but that he never had a probation officer. The following then transpired:

"THE COURT: What were you on unsupervised probation for?

"THE WITNESS: They had tried to accuse me [of] stealing a truck, but I didn't get no -- I didn't do any time behind it.

"THE COURT: I didn't ask you if you'd done any time. How were you on unsupervised probation? You can't be on any kind of probation unless you're convicted.

"THE WITNESS: I was under the custody of my mother for a certain period of time and not getting in any kind of trouble.

"THE COURT: How old were you?

"THE WITNESS: Um, I think I was twenty-seven when it happened.

"THE COURT: How long ago was that?

"THE WITNESS: It's been about a year, maybe two years.

"THE COURT: Was that during the period of time this all was going on?

"THE WITNESS: Yeah, it was.

"THE COURT: Who put you on unsupervised probation?

"THE WITNESS: My lawyer was, um, Mr. Brooks.

"[PROSECUTOR]: I don't believe it.

"THE COURT: Well, who put you on unsupervised probation?

"THE WITNESS: The judge.

"THE COURT: What judge?

"THE WITNESS: Um, I can't recall his name cause it was in Tuskegee.

"THE COURT: So you're telling the Court you were on unsupervised probation for stealing a car?

"THE WITNESS: They said I stole it but they found out, you know, I didn't steal the car. Okay. The damage that was [done] to the car, we agreed I paid the damage that was [done] on the car and I paid for the damage and they told me, you know, I was in custody of my mother, you know, for a certain period of time till I paid the money and after I paid the money ——

"THE COURT: Why did you pay the damage if you didn't steal the car?

"THE WITNESS: Well, the car was in my hands at the time and the car got away from me and I was [held] responsible for it cause the keys [were given] to me.

"THE COURT: By who? The owner of the car?

"THE WITNESS: The owner.

"THE COURT: That's about as far as I know to go to find out.

"[DEFENSE COUNSEL]: Is my question proper now, Your Honor?

"THE COURT: I don't know whether it is or it isn't based on what he is saying."

Thereafter, when cross-examination was continued in the presence of the jury, the following transpired:

"Q. Mr. Trimble, have you been convicted of a crime involving moral turpitude?

"[PROSECUTOR]: Object, Your Honor. McElroy's is clear that's not the way to ask the question. Must be specific about the crime itself.

"THE COURT: Lay your predicate.

"Q. Have you been convicted of a crime of moral turpitude concerning a theft of an automobile?

"[PROSECUTOR]: Objection, Your Honor. That's improper way to ask it and I cite the Court to McElroy's at section --

"THE COURT: Overruled. You may answer.

"Q. Mr. Trimble?

"A. Repeat that again?

"Q. Yes, sir. Have you been convicted of a crime involving moral turpitude concerning the theft of an automobile?

"A. Yes, I have. ——

"Q. Okay. And were you convicted of that, oh, about a year ago in Tuskegee?

"A. Yes.

"Q. All right. And were you put on probation?

"A. I didn't have a probation officer.

"[PROSECUTOR]: Objection, Your Honor. He's going too far now.

"THE COURT: Sustained.

"(WHEREUPON, the following occurred at the bench:)

"[DEFENSE COUNSEL]: Judge, it was my understanding the ruling was changed. Once we showed the offense we would be allowed to show he was on probation. He admitted the offense, he admitted the theft of -- moral turpitude involving theft of an automobile and I'd like to show he was on probation at this time.

"[PROSECUTOR]: Judge, not under impeachment.

"THE COURT: For what purpose?

"[DEFENSE COUNSEL]: To impeach these statements, his testimony here today.

"THE COURT: How?

"[DEFENSE COUNSEL]: I think it shows he would be inclined to cooperate with the State.

"THE COURT: Sustain the objection unless you show me some law.

"[DEFENSE COUNSEL]: Okay. Thank you."

Thereafter, during the defense counsel's closing argument, he argued to the jury that Trimble's alleged conviction and probation provided the motive and bias for his testimony against the appellant.

In the present case, whether the witness was placed on probation arising out of a conviction in another county, i.e., Macon County, does not indicate possible bias in testifying for the State in a case arising out of Montgomery County.

> "'It is generally held, even in jurisdictions where such evidence is not ordinarily admissible, that the fact that a witness has been arrested or charged with crime may be shown or inquired into where it would reasonably tend to show that his testimony might be influenced by interest, bias, or a motive to testify falsely. This principle has been held applicable in cases where criminal charges are pending in the same court against a witness for the prosecution in a criminal case at the time he testifies, as a circumstance tending to show that his testimony is or may be influenced by the expectation or hope that, by aiding in the conviction of the defendant, he would be granted immunity or rewarded by leniency in the disposition of his own case. But it has been held that the pendency of charges against the witness in another county or jurisdiction cannot be shown under this theory of admissibility.'"

Woodward v. State, 489 So.2d 1, 2-3 (Ala.Cr.App. 1986), quoting 81 Am.Jur.2d Witnesses § 589, at pp. 597-98 (1976).

Because the district attorney's office in Montgomery County could not have made any recommendations toward his sentencing in Macon County, the appellant could not have been helped by testifying in the present case. Nor is there any indication in the record that he was promised any help. Therefore, because the "extent of cross-examination on irrelevant facts, for the purpose of testing bias or credibility of the witness's testimony, is a matter resting largely in the discretion of the trial court, [whose] ruling will not be disturbed unless it appears that it has abused its discretion to the prejudice of the complaining party,"

Beavers v. State, 565 So.2d 688, 689-90 (Ala.Cr.App. 1990), we find no error in the instant case.

IX

The appellant argues that Trimble's testimony concerning out-of-court statements made to him by Lorenzo McCarter and by the appellant constituted inadmissible hearsay. During the trial, when the appellant objected to the admission of these statements on this ground, the prosecutor responded that the statements were admissible pursuant to the coconspirator exception to the hearsay rule. On appeal, as he did at trial, the appellant argues that the State did not establish the existence of a conspiracy prior to admitting these statements, and that, therefore, the exception did not and does not apply in the present case.

> "'Where proof of a conspiracy exists, any act or statement made by an accused's co-conspirator in the commission of the crime, done or made before the commission of the crime, during the existence of the conspiracy and in furtherance of a plan or design is admissible against the accused.' Lewis v. State, 414 So.2d 135, 140 (Ala.Crim.App.), cert. denied, 414 So.2d 140 (Ala. 1982). See also Nance v. State, 424 So.2d 1358 (Ala.Crim.App. 1982). Statements of a co-conspirator may be admitted against another co-conspirator when the State presents prima facie evidence of the existence of a conspiracy. Lewis. It is well settled that a conspiracy need not be proved by direct and positive evidence and may be proved by circumstantial evidence. Lewis; Stinson v. State, 401 So.2d 257 (Ala.Crim.App.), cert. denied, 401 So.2d 262 (Ala. 1981). In determining whether the State presented a prima facie case, this court will consider the evidence in the light most favorable to the State. Hutcherson v. State, 441 So.2d 1048 (Ala.Crim.App. 1983); Smelcher v. State, 385 So.2d 653 (Ala.Crim.App. 1980)."

Salter v. State, 578 So.2d 1092, 1094 (Ala.Cr.App. 1990), writ denied, 578 So.2d 1097 (Ala. 1991).

If the State presented sufficient evidence that McCarter and the appellant were involved in the conspiracy, evidence of McCarter's statements was admissible against the appellant, regardless of whether the prima facie showing of the existence of the conspiracy was made prior to the admission of the statements. The order of proof in this context is not a legal requisite.

> "While it is preferable that a co-conspirator testify after the prima facie showing of the existence of a conspiracy, such order of proof is not mandatory. The order of proof requirement is for the purpose of expediting the trial and saving the valuable time of the trial court, rather than protecting or securing any supposed right a defendant might have. Morton v. State, 338 So.2d 423, 425 (Ala.Cr.App.), cert. denied, 338 So.2d 428 (Ala. 1976); Conley [v. State, 354 So.2d 1172 (Ala.Cr.App. 1977)]."

Nance v. State, 424 So.2d 1358, 1365 (Ala.Cr.App. 1982).

> "Furthermore, '[e]ven if testimony relating statements made by confederates is objectionable as premature, in that independent proof of conspiracy has not been established before its admittance, subsequent proof of the conspiracy cures any error in the premature admission. Conley v. State, 354 So.2d 1172 (Ala.Cr.App. 1977).' Tucker v. State, 454 So.2d 541, 546-47 (Ala.Cr.App. 1983), reversed on other grounds, Ex parte Tucker, 454 So.2d 552 (Ala. 1984)."

Creech v. State, 508 So.2d 302, 304 (Ala.Cr.App. 1987). See also Inzer v. State, 447 So.2d 838, 848-49 (Ala.Cr.App. 1983), cert. denied, 447 So.2d 850 (Ala. 1984).

In the present case, prior to Trimble's testimony, the State introduced a witness's testimony that McCarter, Hood, and Sockwell were all present and all aided in the commission of the murder. The witness further testified that a female called McCarter's beeper just prior to the victim's death, stating that the victim was leaving. The State also presented testimony to the effect that

McCarter and the appellant were sexually involved and that, when asked if McCarter could have committed the offense, the appellant responded that, "If he did kill him, I did not tell him to." There was further circumstantial evidence concerning the appellant's behavior upon learning that her husband was missing and, thereafter, dead. The appellant was able to become extremely calm for questioning, she gave a tour of her home to one of the officers, and, when asked how she was able to remain so calm, she acknowledged that she and the victim were experiencing marital problems and that he drank excessively and abused her. Thereafter, Trimble testified that, while he was at work with McCarter, McCarter got beeped and went to answer the call. McCarter then called Trimble to the telephone, saying that someone wanted to speak to him. Trimble testified that the person on the telephone identified herself as Louise Harris and that she told him that she needed "someone to do a job." She further stated that she was referring to killing someone, and that the job had to be done prior to Friday because the victim was "spending into some of the insurance money and he was adding onto the house." Trimble testified that he recognized the voice as that of Louise Harris, whom he had met on previous occasions.

Because the conspiracy was clearly proved by the State, McCarter's statements to Trimble, asking him to commit the murder or to find someone who would commit the murder, were admissible. Harris's statement was admissible as an admission. See C. Gamble, McElroy's Alabama Evidence (4th ~~Ed.~~ 1991) § 264.01(1).

X

The appellant argues that her conviction and sentence were obtained by emotional appeals to the suffering of the victim's family in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Specifically, she argues that the trial court erred by allowing the victim's sister to sit at the table for the prosecution during trial, and she claims that § 15-14-55, Code of Alabama 1975, which permits a victim's family member to sit at the table for the prosecution at trial, is unconstitutional in the context of a capital case. The appellant also argues the trial court erred by allowing the victim's sister to take the stand and to testify about allegedly irrelevant matters, and by allowing the State to otherwise emphasize the presence and suffering of the victim's family members. She also argues that the State sought to obtain a verdict and a sentence based on the victim's characteristics. The appellant cites to South Carolina v. Gathers, 490 U.S. 805, 109 S.Ct. 2207 (1989), and Booth v. Maryland, 482 U.S. 496 (1987).

The appellant's arguments, based on South Carolina v. Gathers and Booth v. Maryland must fail because both of these cases were specifically overruled by the United States Supreme Court in Payne v. Tennessee, ___ U.S. ___, 111 S.Ct. 2595 (1991). See Smith v. State, 588 So.2d 561 (Ala.Cr.App. 1991). See also McWilliams v. State, [Ms. 6 Div. 190, August 23, 1991] ___ So.2d ___ (Ala.Cr.App. 1991).

The appellant's arguments concerning presence at the table for the prosecution of the victim's sister have been previously addressed by this court in Henderson v. State, 583 So.2d 276 (Ala.Cr.App. 1990), affirmed, 583 So.2d 305 (Ala. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1268, 117 L.Ed.2d 496 (1992).

> "The presence of a victim seated at the counsel table for the prosecution is specifically provided for by 'the Alabama Crime Victims' Court Attendance Act,' codified at §§ 15-14-50 et seq., Code of Alabama 1975. This act gives victims of a criminal offense the right to be present in the courtroom and seated alongside the prosecutor during the trial of the individual charged with that offense.
>
> "The appellant argues, however, that this statute is unconstitutional generally, or alternatively, with regard to capital murder cases specifically. This argument has been previously addressed -- and rejected -- by this Court in both capital as well as non-capital cases. In Crowe v. State, 485 So.2d 351, 362-63 (Ala.Cr.App. 1984), reversed on other grounds, 485 So.2d 373 (Ala. 1985), cert. denied, 477 U.S. 909, 106 S.Ct. 3284, 91 L.Ed.2d 573 (1986), a capital murder case in which the death penalty was imposed, this Court specifically rejected the notion that the seating of the victim's widow at counsel table for the prosecution violated any constitutional rights of the accused. Likewise, in Anderson v. State, 542 So.2d 292, 304-05 (Ala.Cr.App. 1987), writ quashed, 542 So.2d 307 (Ala. 1989), cert. denied, ___ U.S. ___, 110 S.Ct. 116, 107 L.Ed.2d 77 (1989), a capital murder case in which life imprisonment without possibility of parole was imposed, we rejected this argument, holding as follows:
>
> "'Furthermore, under § 15-14-55, Code of Alabama (1975), "a victim of a criminal offense shall be exempt from the operation of rule of court, regulation, or statute or other law requiring separation or exclusion of witnesses from court in criminal trials or hearings." Under § 15-14-56(a), "[w]henever a victim is unable to attend such trial or hearing or any portion thereof by reason of death ... the victim's family may select a representative who shall be entitled to exercise any right granted to the victim, pursuant to the provisions of this article." ...'"

Id. at 285-86. Therefore, the presence of the victim's family and evidence of victim impact did not constitute error.

Moreover, the appellant argues that the prosecutor erred by dwelling on and emphasizing the victim's role as a deputy sheriff, thereby prejudicing her case pursuant to Booth v. Maryland, supra and South Carolina v. Gathers, supra. However, as previously noted, these cases were overruled by Payne v. Tennessee, supra. Furthermore, the testimony concerning the victim's role as a police officer was relevant to the State's evidence presented during the guilt phase, as this case was initially brought on two counts, the second of which charged the appellant with the capital murder of a law enforcement officer. § 13A-5-40(a)(5), Code of Alabama 1975.

XI

The appellant argues that her statements made to officers investigating her husband's death on the night of the murder were inadmissible, because, she argues, they were taken in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments and of the constitution of the State of Alabama. Specifically, the appellant argues that the statements she made to her husband's coworkers should have been held inadmissible because, she says, she was never given the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966). However, the record indicates that the appellant was not subjected to a custodial interrogation so as to trigger the safeguards of Miranda v. Arizona, supra. When the appellant made these statements, she was present in her home, and the officers were there to inform her of her husband's death and to investigate

any leads that the appellant may be able to provide, as well as to determine whether the victim had any weapons at his home. The appellant's body had just been discovered, and the officers had no reason to suspect that the appellant was in any way connected with the death.

> "[C]ompliance with the procedural safeguards of Miranda is not necessary unless the confession is a product of 'custodial interrogation' or 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' Id. at 444, 86 S.Ct. at 1612 (footnote omitted). 'It is settled that the safeguards prescribed by Miranda become applicable as soon as a suspect's freedom of action is curtailed to a "degree associated with formal arrest."' Berkemer v. McCarty, 468 U.S. 420, 440, 104 S.Ct. 3138, 3150, 82 L.Ed.2d 317 (1984) (quoting California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983) (per curiam)). The Supreme Court reiterated the reasons for the Miranda safeguard in Minnesota v. Murphy, 465 U.S. 420, 429-30, 104 S.Ct. 1136, 1143-44, 79 L.Ed. 2d 409 (1984), as follows:
>
> "'Not only is custodial interrogation ordinarily conducted by officers who are "acutely aware of the potentially incriminatory nature of the disclosures sought," Garner v. United States, [424 U.S. 648], at 657 [96 S.Ct. 1178 at 1184, 47 L.Ed.2d 370] [1976], but also the custodial setting is thought to contain "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." Miranda v. Arizona, 384 U.S. at 467 [86 S.Ct. at 1624]. See Schneckloth v. Bustamonte, 412 U.S. 218, 246-247 [93 S.Ct. 2041, 2057-2058, 36 L.Ed.2d 854] (1973). To dissipate "the overbearing compulsion ... caused by isolation of a suspect in police custody," United States v. Washington, 431 U.S. 181, 187, n. 5, [97 S.Ct. 1814, 1819 n. 5, 52 L.Ed.2d 238] (1977), the Miranda court required the exclusion of incriminating statements obtained during custodial interrogation unless the suspect fails to claim the Fifth Amendment privilege after being suitably warned of his right to remain silent and of the consequences of his ~~fai~~lure to assert it. 384 U.S., at 467-469, 475-477 [86 S.Ct. at 1624-1625, 1628-1629]. We have consistently held, however, that this extraordinary safeguard "does not apply outside the context of the inherently coercive custodial interrogations for which it was designed." Roberts v. United States, 445 U.S. [552] at 560 [100 S.Ct. 1358 at 1364, 63 L.Ed.2d 622] [1980].'
>
> "It is the compulsive aspect of custodial interrogation, and not the strength or content of the officer's suspicion at the time the questioning was conducted, which led the Court to impose the Miranda requirements with regard to custodial questioning. Beckwith v. United States, 425 U.S. 341, 346-47, 96 S.Ct. 1612, 1616, 48 L.Ed.2d 1 (1976). ...
>
> "....
>
> "Among the factors to be considered in making this determination are whether the suspect was questioned in familiar or, at least, neutral surroundings; the number of law enforcement officers present at the scene; the degree of physical restraint of the suspect; the duration and character of the questioning; and how the suspect got to the place of questioning. See 1 LaFave and Israel, supra, at § 6.6(c). Other pertinent factors are the language used to summon the individual; the extent to which the person is confronted with evidence of guilt; and the degree of pressure applied to detain the individual. Hooks v. State, slip op. at 36 (quoting United States v. Wauneka, 770 F.2d 1434, 1438 (9th Cir. 1985). Furthermore, '[b]ecause the Court in Miranda expressed concern with the coerciveness of situations in which the suspect was "cut off from the outside world" and "surrounded by antagonistic forces" in a "police dominated atmosphere" and interrogated "without relent," circumstances relating to those kinds of concerns are also relevant on the custody issue.' 1 LaFave and Israel, supra, at § 6.6(f).
>
> "In regard to the 'very significant factor' of the place of the interrogation, id., it has been observed that 'courts are much less likely to find the circumstances custodial when the interrogation occurs in familiar or at least neutral surroundings.' Id. at 6.6(e). The underlying rationale is that since the suspect is in familiar surroundings, he is not subjected to the same pressures as in the police-dominated atmosphere of the police station. Id.
>
> "465 U.S. at 433, 104 S.Ct. ~~at~~ 1145 (footnote omitted)."

Finch v. State, 518 So.2d 864, 867-69 (Ala.Cr.App. 1987).

In the present case, the appellant was questioned in her home by officers, some of whom had known the appellant socially. The appellant was not a suspect at the time and was not in any way restrained. She could not have reasonably believed that she was in custody. Any statements or comments that she made were willingly volunteered, within the protection of her own home.

XII

The appellant arguges that the trial court erred in restricting his cross-examination of Freddie Patterson, who was present in the car with Lorenzo McCarter, Michael Sockwell, and Alex Hood when the victim was shot. Patterson was not charged in the present case, and the State presented evidence that he had no knowledge of the planned murder. The appellant argues that she should have been allowed to question the witness concerning an unrelated felony charge, which was pending against him at the time he was brought in for questioning in the present case. Patterson later pleaded guilty to a misdemeanor on this charge. The appellant argued that she had the right to question Patterson concerning this charge, as well as his other arrests and convictions, in order to demonstrate bias or self-interest.

The record reveals that, during the direct examination of Patterson, he testified that he went to the police station to talk to an officer concerning this case approximately four days after the other three men who had been present in the automobile had been arrested. He testified that he voluntarily went to the police

department and "turned [himself] in and talked to them." He further testified that he was never charged in this case, but that, when he turned himself in, a charge of leaving the scene of an accident was pending against him in Montgomery County. He testified that he subsequently pleaded guilty to that charge. He further testified that he had been convicted of theft of property in the second degree, arising from an incident in Autauga County. Thereafter, during a conference outside the presence of the jury, the trial court held that the defense counsel would be allowed to question the witness concerning the conviction in order to show possible bias and self-interest. However, he ruled that the defense counsel would not be allowed to go into the details of the unrelated offense. Defense counsel responded that he had no intention of so questioning the witness. During a later conference outside the hearing of the jury, defense counsel stated that he had a copy of Patterson's "rap sheet" and that he wished to question the witness concerning the convictions. Defense stated that he should be permitted to do so, because the State had previously "opened the door" to this subject by asking the witness whether he had ever been in trouble with the law. The trial court held that the State's question concerned felony convictions, and the trial court noted that he had "allowed you [the defense] to go into the -- by prior ruling -- to the leaving the scene of an accident, but I do not think that that opened it up to any other misdemeanor arrest and so forth and so on." Defense counsel responded:

> "We did not go into it. ~~This~~ is their question. The prosecution asked this question; we did not ask this

> question. We did not ask the question, and we think it's part of her constitutional rights, on her right of confrontation, her right of due process under protection of law to be able to go into the subject which the prosecution has raised, particularly on a key witness like this."

Moreover, the defense counsel was allowed to argue during his closing argument that the witness's involvement in the crime, arrest under suspicion of the charges, and prior convictions all tended to prove his bias and self-interest in testifying for the State.

> "'"The scope of cross-examination in a criminal proceeding is within the discretion of the trial judge and it is not reviewable except for the trial judge's prejudicial abuse of discretion. Jackson v. State, Ala.Cr.App., 353 So.2d 40, cert. denied, 353 So.2d 48 (1977). McFerrin v. State, Ala.Cr.App., 339 So.2d 127 (1976). The right to a thorough and sifting cross-examination of a witness does not extend to matters that are collateral or immaterial and the trial judge is within his discretion in limiting questions which are of that nature. McLaren v. State, Ala.Cr.App., 353 So.2d 24, cert. denied, 353 So.2d 35 (1977); McDonald v. State, Ala.Cr.App., 340 So.2d 103 (1976)."
>
> "See also Burton v. State, 487 So.2d 951 (Ala.Cr.App. 1984). While rather wide latitude is allowed on cross-examination, the court has reasonable discretion in confining the examination to prevent diversion to outside issues.'"

Steeley v. State, [Ms. 90-1302, February 28, 1992] ___ So.2d ___ (Ala.Cr.App. 1992), quoting Beavers v. State, 565 So.2d 688, 690 (Ala.Cr.App. 1990).

In McMillian v. State, 594 So.2d 1253 (Ala.Cr.App. 1991), remanded on other grounds, 594 So.2d 1288 (Ala. 1992) this court held that the trial court had not abused its discretion in limiting the defendant's cross-examination of a key State's witness, where

the defendant had sought to ask the witness about the following subjects: how long he had spent in prison for a forgery conviction, "an unrelated pending murder case," and when the witness intended to meet with his attorney and enter his guilty plea in the instant case. This court held:

> "These questions sought to elicit collateral and irrelevant matter; therefore, the trial court did not abuse its discretion in sustaining the objections to them. The evidence of [the witness's] criminal record, which was substantial, was before the jury. The jury was made aware that he had been convicted and had served time for burglary, forgery, and theft. The jury was also aware that [the witness] had made a deal with the State to enter a plea of guilty to a lesser charge at a later time in return for his testimony."

McMillian v. State, supra, at 1261-62.

Even if the prosecutor, in fact, "opened the door" to the appellant's questions concerning these unrelated charges and convictions against the witness, and even in light of the witness's key role as one of the two main nonaccomplice witnesses against the appellant, any error in limiting this cross-examination was harmless.

> "'[A] party is given wide latitude on cross-examination to test a witness's partiality, bias, or interest.' Perry v. Brakefield, 534 So.2d 602, 608 (Ala. 1988). The rule in this state, notwithstanding the general principle concerning the development of the interest or bias of a witness, is that the range of cross-examination rests largely in the discretion of the trial court and that the court's rulings will not be disturbed unless it clearly appears that the defendant was prejudiced by the rulings. However, 'where the witness' testimony is important to determination of the issues being tried, there is little, if any, discretion in the trial judge to disallow cross-examination on matters which tend to indicate the bias of the witness.' Wells v. State, 292 Ala. 256, 258, 292 So.2d 471, 473 (1973).

"... '"[T]he extent to which a witness may properly be cross-examined as to collateral circumstances for the purpose of showing bias depends in some instances upon the importance of his testimony, and especially upon whether such testimony is of a nature to be seriously affected by prejudice, bias, or hostility."' Louisville & N.R. v. Martin, 240 Ala. 124, 131, 198 So. 141, 147 (1940) (emphasis in original). '[I]t is an abuse of discretion and a violation of constitutional rights to deny to a defendant the right to cross-examine a witness at all on a "subject matter relevant to the witness's credibility," such as the witness's possible motive for testifying falsely.' United States v. Brown, 546 F.2d 166, 169 (5th Cir. 1977)....

"....

"Although we are extremely reluctant to hold that any improper limitation of cross-examination constitutes harmless error, we are convinced beyond any reasonable doubt that the error in this case did not contribute to the verdict of the jury. See Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 705 (1967). Violations of the confrontation clause of the Sixth Amendment are subject to harmless error analysis. Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

> "'[W]e hold that the constitutionally improper denial of the defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to Chapman [v. California, 386 U.S. 18, 87 S.Ct. 824], harmless-error analysis. The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. Those factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.'

"Van Arsdall, 475 U.S. at 684, 106 S.Ct. at 1438."

Hooper v. State, 585 So.2d 142, 145-46 (Ala.Cr.App. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1295, 117 L.Ed.2d 517 (1992).

In the present case, in light of the overall strength of the prosecution's case, any error by the trial court in limiting this cross-examination was harmless because the witness admitted that he had been in trouble with the law and that he had a criminal record; and the appellant was allowed to cross-examine the witness concerning his previous conviction, which was pending at the time of his questioning.

XIII

The appellant argues that the State introduced and relied on prejudicial evidence of the appellant's bad character in order to obtain a conviction against her. Specifically, the appellant refers to evidence that she, a married woman, was having an affair with codefendant Lorenzo McCarter. The appellant argues that the probative value of this evidence was greatly outweighed by its prejudicial effect. However, it is clear from the record and from the evidence introduced at trial that the appellant's relationship with Lorenzo McCarter was the cornerstone of the conspiracy and established the motive for the murder.

> "In cases based largely on circumstantial evidence, a rather wide range of evidence is allowed in developing circumstances tending to show motive on the part of the accused. Turner v. State, 224 Ala. 5, 140 So.2d 447 (1931); Chambliss v. State, 373 So.2d 1185 (Ala.Cr.App.), cert. denied, 373 So.2d 1211 (Ala. 1979). Where the evidence is in conflict as to whether the accused did the act, or is partially or wholly circumstantial upon that issue, the question of motive becomes a leading inquiry. Harden v. State, 211 Ala. 656, 101 So. 442 (1924). While not alone sufficient to justify a conviction, motive may strengthen circumstantial evidence. Dolvin v. State, 391

So.2d 666 (Ala.Cr.App. 1979), affirmed, 391 So.2d 677 (Ala. 1980). Evidence of a particular relationship between the accused and another person, when combined with other factors, may be relevant in proving motive and therefore be admissible. Turner, supra.

"As our Supreme Court stated in McDonald v. State, 241 Ala. 172, 174, 1 So.2d 658 (1941): 'Testimony going to show motive, though motive is not an element of the burden of proof resting on the State, is always admissible.' (Emphasis added.) And as we held in Baalam v. State, 17 Ala. 451, 453 (1850), 'When it is shown that a crime has been committed and the circumstances point to the accused as the guilty agent, then proof of a motive to commit the offense, though weak and inconclusive evidence, is nevertheless admissible.' See also McClendon v. State, 243 Ala. 218, 8 So.2d 883 (1942); Spicer v. State, 188 Ala. 9, 65 So. 972 (1914). Even slight evidence to show a motive for doing the act in a criminal case is not to be excluded, but should be left to the consideration of the jury. Arnold v. State, 18 Ala.App. 453, 93 So. 83 (1922).

"Further in Earnest v. State, 21 Ala.App. 534, 536, 109 So. 613 (1926), the court held the following:

> "'[I]t is permissible in every criminal case to show that there was an influence, an inducement, operating on the accused, which may have led or tempted him to commit the offense. It may spring from the lust of gain, or the gratification of an unlawful passion, from animosity, ill will, hatred, or revenge. The extent or magnitude of such motive, whether great or small, is also a proper inquiry....'"

Kelley v. State, 409 So.2d 909, 913-14 (Ala.Cr.App. 1981) (wherein testimony of the defendant's involvement with a female employee was properly admitted as tending to show motive in a case of embezzlement).

Thus, in the present case, the evidence concerning the appellant's extramarital affair with one of her codefendants was relevant as evidence toward establishing the conspiracy and the motive for the murder.

XIV

The appellant argues that her rights under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and her rights under the Alabama constitution, were violated by the introduction of prejudicial and gruesome photographs of the deceased.

> "As a general rule, photographs are admissible in evidence if they tend to prove or disprove some disputed or material issue, to illustrate or elucidate some other relevant fact or evidence, or to corroborate or disprove some other evidence offered or to be offered, and their admission is within the sound discretion of the trial judge. Photographs which depict the character and location of external wounds on the body of a deceased are admissible even though they are cumulative and based upon undisputed matters. The fact that a photograph is gruesome and ghastly is no reason to exclude its admission into evidence, if it has some relevancy to the proceedings, even if the photographs may tend to inflame the jury."

Magwood v. State, 494 So.2d 124, 141 (Ala.Cr.App.), affirmed, 494 So.2d 154 (Ala. 1986) (citations omitted).

In the present case, the photographs corroborated certain State's evidence and illustrated certain witnesses' testimony. Moreover, the photographs served to prove the victim's identity, show the nature and extent of his wounds, depict the condition of the scene where the body was found, and depicted the condition and existence of certain items of evidence, as well as their location. We find no abuse of discretion by the trial court in the admission of these photographs. Grice v. State, 527 So.2d 784 (Ala.Cr.App. 1988).

XV

The appellant further argues that the State introduced photographs of the victim, while he was still alive, in order to obtain a verdict and sentence based on passion and prejudice, in violation of her rights to a fair trial and sentencing. She argues that the photographs of the victim while he was alive were irrelevant to any issue before the jury and introduced solely to inflame the jury. The single picture of the victim, prior to his murder, was relevant as it tended to identify the victim, especially in light of the condition of the victim's face after having been shot. As such, the introduction of this photograph during the guilt phase was not an Eighth Amendment violation. See Willis v. Kemp, 838 F.2d 1510, 1521 (11th Cir. 1988), cert. denied, 489 U.S. 1059 (1989).

Moreover, the introduction of this photograph during the sentencing phase was not error. "It is not necessary that the sentencing decision be made in the context in which the victim is a mere abstraction." Brooks v. Kemp, 762 F.2d 1383, 1409 (11th Cir. 1985) (en banc), vacated, 478 U.S. 1016 (1986).

XVI

The appellant argues that she was denied a fundamentally fair trial and sentencing, due to several instances of prosecutorial misconduct. Those prosecutorial comments made during the guilt phase will be addressed under subheading "A" and those prosecutorial comments made during the sentencing phase will be addressed under subheading B.

A

The appellant cites a number of comments made by the prosecutor during closing argument which she alleges were so prejudicial as to mandate reversal. Only two of these instances were objected to; the remaining are raised for the first time on appeal, and, therefore, must be analyzed under the "plain error" rule. Rule 45A, A.R.App.P. The objected-to comments concern the prosecutor's reference to "open file discovery," and her comment that the testimony of State's witness Trimble and that of State's witness McCarter matched.

The comment made by the prosecutor concerning the State's open file discovery was as follows:

> "You saw her [the appellant's] testimony, and you saw she had her story down pretty good. She's had what, eighteen months, eighteen months since she started planning this. Fourteen-sixteen months since she's been arrested. She's had nothing to do but get her story straight, with the advantage of having every piece of evidence the State had through its resources, she had. So you see, she had our resources, too, didn't she? -- and the advantage of being able to concoct her story to fit as best it could. The State has --
>
> "[DEFENSE COUNSEL]: Objection, Your Honor. That's not the evidence and -- it's not a legitimate inference from the evidence.
>
> "THE COURT: Let's move on. It's argument."

Prior to this comment, during defense counsel's closing argument, the following transpired:

> "And how do you prove your innocence? Now remember, when you think about that, think of all the resources of the State. You've got Investigators, Sheriff's Department, you've got the Police Department, you've got numerous resources to gather evidence. Think about all those resources being focused on ~~one~~ little Louise Harris. Think about the overwhelming burden that is to one little

> individual with limited resources. Think about your friend or whoever was charged with that type offense. Have some compassion for them."

The State's reference to the fact that the appellant had access to all of the State's evidence was a proper reply in kind to the appellant's argument that she had very limited resources, as opposed to those of the State. See Kuenzel v. State, 577 So.2d 474, 503 (Ala.Cr.App. 1990), affirmed, 577 So.2d 531 (Ala. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 242, 116 L.Ed.2d 197 (1991), citing Ex parte Rutledge, 482 So.2d 1262, 1264 (Ala. 1984). See also Salter v. State, 578 So.2d 1092 (Ala.Cr.App. 1990), cert. denied, 578 So.2d 1097 (Ala. 1991); Smith v. State, 588 So.2d 561, 572 (Ala.Cr.App. 1991).

Moreover, even if this comment could be considered error as a comment on matters not in evidence, the comment would constitute harmless error. See Kuenzel v. State, 577 So.2d 474, 493 (Ala.Cr.App. 1990). Cf. Chatom v. State, 591 So.2d 101 (Ala.Cr.App. 1991).

The comment by the prosecutor that the two State's witnesses, Trimble and McCarter, gave testimony that "matched" is a proper inference from the evidence, as these witnesses did not contradict each other, during their testimony, in any significant regard.

> "Although counsel has 'no right to create evidence by his argument,' Davis v. State, 49 Ala.App. 587, 590, 274 So.2d 360, 363 (1972), cert. denied, 290 Ala. 364, 274 So.2d 363 (1973), 'counsel may draw any inference which the facts tend to support.' Brothers v. State, 236 Ala. 448, 452, 183 So. 433, 436 (1938). 'Counsel for the State and defendant are allowed a rather wide latitude in drawing their deductions from the evidence.' Arant v. State, 232 Ala. 275, 279, 167 So. 540, 543 (1936). 'Counsel has a right to argue any reasonable inference from the evidence or lack of evidence ... and to draw conclusions from the evidence based on their own reasoning.' Roberts v. State, 346 So.2d 473, 476 (Ala.Cr.App.), cert. denied, 346 So.2d 478 (Ala. 1977). 'Trial judges ordinarily are loath to limit inferential argument which has any connection with the evidence even though far-fetched.... So long as counsel does not travel out of his case and confines statements to reasonable inferences deducible from the evidence, he should not be controlled.' Roberts, 346 So.2d at 477. '[I]t would be dangerous to accord the presiding judge the right and power to intervene and declare authoritatively when an inference of counsel is or is not legitimately drawn. This is for the jury to determine, if there be any testimony on which to base it.' Cross v. State, 68 Ala. 476, 483 (1881)."

Kuenzel v. State, supra at 493-94.

The other prosecutorial comments made during the guilt phase that the appellant alleges are error were not objected to and therefore to be considered on appeal must amount to "plain error," or error that has or probably has "adversely affected the substantial right of the appellant." Rule 45A, A.R.App.P. The appellant refers to 10 allegedly improper comments by the prosecutor during his closing argument in the guilt phase.

The prosecutor's comment that State's witness Patterson had no reason to lie and that State's witness Trimble had nothing to gain were proper inferences from the evidence. The evidence showed that Patterson was not an accomplice to the murder and that Trimble was in no way suspected of being involved. Moreover, there is no evidence of any bargains made in exchange for Trimble's testimony. These comments by the prosecutor were also proper as reply in kind to defense counsel's previous argument that both witnesses were biased and had a motive for testifying for the State.

The appellant also argues that the prosecutor's statement that Lorenzo McCarter would "have his day in court" was not a proper inference from the evidence. However, the record indicates that the agreement made by the State, in order to gain McCarter's testimony, was that the State would not seek the death penalty in McCarter's capital murder trial. There was no evidence that the charges against McCarter would be dropped or that McCarter would plead guilty to the capital offense. Moreover, even if McCarter were to plead guilty, the State would still have to prove his guilt. See § 13A-5-42, Code of Alabama 1975.

The prosecutor's reference to the fact that Alex Hood and Michael Sockwell invoked their Fifth Amendment right to remain silent was made pursuant to her explanation of the agreement made by the State to obtain McCarter's testimony. Although the appellant argues that this comment was error under Ex parte Tomlin, 540 So.2d 668 (Ala. 1988), the present case is readily distinguishable. In Ex parte Tomlin, the Alabama Supreme Court held that it was prosecutorial error for the State to repeatedly refer during closing argument to the fact that the defendant's wife could not be called to testify. The Court held that this comment implied that the defendant's wife was not testifying because she knew something that would implicate her husband. In the present case, the two witnesses took the stand and refused to testify in front of the jury. Moreover, no close relationship exists between these witnesses and the appellant, which would lead to the inference that these witnesses knew that the appellant was guilty

and were refusing to testify in order to protect her. More reasonably, these witnesses' refusal to testify would have been a matter of self-protection. Because the jury was well aware of the fact that the two witnesses refused to testify, the prosecutor was merely commenting on the evidence.

The comment by the prosecutor that the appellant moved out of her mother-in-law's house so that she could have the privacy in which to carry on an affair was a reasonable inference from the evidence. There was evidence presented that the appellant was very unhappy with the fact that she was living with the victim's mother, and there was also evidence that the appellant had been involved in other extramarital affairs prior to the one with Lorenzo McCarter.

The prosecutor's comment that the appellant had possibly been drinking or was otherwise intoxicated when she was called concerning the victim's whereabouts on the night of his murder was a proper inference from the evidence. There was testimony that the appellant's speech was slurred and sluggish during the telephone call and, when questioned the witness, who had placed the call, stated that he was uncertain whether this could have been the result of a state of intoxication.

The prosecutor's comment that the appellant was "begging ... to frame Freddie Patterson" was a proper reply in kind to defense counsel's argument that Patterson was, in fact, an accomplice and should have been charged in the present case.

The prosecutor's comment that the appellant wanted the victim killed by Friday because of a car loan was also a proper inference

from the evidence. Trimble testified that the appellant had stated she wanted the victim killed by Friday because he was dipping into his insurance policies in order to build an addition onto their house. There was also testimony that the appellant knew that her husband was in the process of purchasing an automobile for her daughter. The prosecutor further stated that the car loan did not "come through" as a reply in kind to defense counsel's argument during his closing statement, wherein he stated:

> "Look at this loan application that they've made a big to-do over. Take this back and look at it. Sergeant Harris was buying a car for Louise's daughter. Eight hundred and fifty dollars. They have been trying to tell you all this time she had to get him killed before he got the eight hundred and fifty dollars. Now this is real important to them. They struggled to get this in. They -- you know, they brought witnesses up here and they got it in and here it is. Take this application back and look at it. If you don't know from your own experience, this application is going to tell you. When you go down to get a loan at the Credit Union you have credit life on it, and it's right there -- credit life. Now what does that mean? We all know if Sergeant Harris had gotten the eight hundred and fifty dollars and then been killed, the loan would have been paid for and they would have had another car in the family."

The prosecutor's comments that there was no evidence that McCarter had a criminal conviction and that McCarter had made consistent statements concerning the murder since his arrest were proper inferences from the evidence. The record indicates that there was no evidence before the jury of any convictions, although McCarter had admitted that Harris got him "out" when he had been charged with driving under the influence. Moreover, McCarter's statements had not significantly changed since he had admitted his guilt.

The prosecutor's statement that Trimble did not change his testimony concerning his voice identification of Harris was a proper argument. Although Trimble initially testified that the appellant was not identified as "the voice" on the telephone, subsequently, during a conference outside the presence of the jury, Trimble testified that he had misunderstood the trial court's initial question concerning the identification. Although an inference could be drawn that the witness intentionally changed his testimony, it is also possible that he misunderstood the question.

> "'Counsel in the trial of any lawsuit has the unbridled right (to be sure, the duty) to argue the reasonable inferences from the evidence most favorable to his client.' Ex parte Ainsworth, 501 So.2d 1269, 1270 (Ala. 1986) (footnote omitted). '[T]he rule is that counsel are allowed considerable latitude in drawing their deductions from the evidence in argument to the jury.' Espey v. State, 270 Ala. 669, 674, 120 So.2d 904, 907 (1960)."

Kuenzel, supra at 492.

Similarly, the prosecutor was merely arguing on behalf of his "client" when he requested that the jurors not consider the lesser-included offense of murder. The prosecutor, as an advocate, has the right to make such arguments to the jury.

B

The appellant cites several allegedly improper comments by the prosecutor during the sentencing hearing before the trial judge, which she argues resulted in a jury verdict override and in imposition of the death sentence, based on improper considerations. The appellant raised no objections to any of the now-cited comments

made during the prosecutor's closing argument in this sentencing hearing.

> "'While this failure to object does not preclude review in a capital case, it does weigh against any claim of prejudice.' Ex parte Kennedy, 472 So.2d at 1111 (emphasis in original). 'This court has concluded that the failure to object to improper prosecutorial arguments ... should be weighed as part of our evaluation of the claim on the merits because of the suggestion that the defense did not consider the comments in question to be particularly harmful.' Johnson v. Wainwright, 778 F.2d 623, 629 n. 6 (11th Cir. 1985), cert. denied, 484 U.S. 872, 108 S.Ct. 201, 98 L.Ed.2d 152 (1987). 'Plain error is error which, when examined in the context of the entire case, is so obvious that failure to notice it would seriously affect the fairness, integrity, and public reputation of the judicial proceedings.' United States v. Butler, 792 F.2d 1528, 1535 (11th Cir.), cert. denied, 479 U.S. 933, 107 S.Ct. 407, 93 L.Ed.2d 359 (1986)."

Kuenzel v. State, supra at 489.

The prosecutor commented that the aggravating circumstance that the capital offense was committed for pecuniary gain was established by the jury's verdict of guilt on the capital count. This argument is a correct statement of the law. See Haney v. State, [Ms. 7 Div. 148, March 29, 1991] ___ So.2d ___ (Ala.Cr.App. 1991) ("where a defendant has been convicted of the capital offense of murder for hire, even though that person was the hirer and was convicted of the offense as an accomplice pursuant to the complicity statute, the aggravating circumstance that the capital offense was committed for pecuniary gain is established as a matter of law").

The prosecutor's argument that the trial court should not consider the testimony of the appellant's five character witnesses, because none of them knew of her affair with Lorenzo McCarter was

not an improper comment. The evidence indicates that each of the witnesses stated that they were unaware that the appellant was having the extramarital affair with McCarter. "The prosecutor has the right to present his impressions from the evidence. He may argue every matter of legitimate inference and may examine, collate, sift, and treat the evidence in his own way." Donahoo v. State, 505 So.2d 1067, 1072 (Ala.Cr.App. 1986). Further, the prosecutor's argument to the trial court could be understood as a comment that the witnesses must not have known the appellant very well, if they were unaware of the affair.

Moreover, any inferential argument by the prosecutor that the appellant should be sentenced to death because she was not a good person would be a legitimate argument based on evidence that she hired people to murder her husband for money and to legitimize an extramarital affair.

The next allegation of error by the prosecutor concerned her argument to the trial court that he not consider the credibility of certain State's witnesses, particularly McCarter, in that the jury had already considered that evidence and arrived at a verdict of guilt. Essentially, the prosecutor argued that the trial court not consider the credibility of certain State's witnesses as a non-statutory mitigating factor. This comment does not violate Lockett v. Ohio, 438 U.S. 586 (1978), which held that a trial court must consider such nonstatutory mitigating circumstances as aspects of the defendant's character and background, as well as certain

circumstances of the offense. As stated by the United States Supreme Court in Franklin v. Lynaugh, 487 U.S. 164, 174 (1988):

> "Our edict that, in a capital case, '"the sentencer.... [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense,"' Eddings v. Oklahoma, 455 U.S. 104, 110, 102 S.Ct. 869, 874, 71 L.Ed.2d 1 (1982) (quoting Lockett, 438 U.S., at 604, 98 S.Ct., at 2964), in no way mandates reconsideration by juries, in this sentencing phase, of their 'residual doubts' over a defendant's guilt. Such lingering doubts are not over any aspect of petitioner's 'character,' 'record,' or a 'circumstance of the offense.' This Court's prior decisions, as we understand them, fail to recognize a constitutional right to have such doubts considered as a mitigating factor."
>
> "Our cases do not support the proposition that a defendant who has been found to be guilty of a capital crime beyond a reasonable doubt has a constitutional right to reconsideration by the sentencing body of lingering doubts about his guilt. We have recognized that some states have adopted capital sentencing procedures that permit defendants in some cases to enjoy the benefit of doubts that linger from the guilt phase of the trial, see Lockhart v. McCree, 476 U.S. 162, 181, 106 S.Ct. 1758, 1768, 90 L.Ed.2d 137 (1986), but we have never indicated that the Eighth Amendment requires states to adopt such procedures. To the contrary, as the plurality points out, we have approved capital sentencing procedures that preclude consideration by the sentencing body of 'residual doubts' about guilt. See Ante, at 2327, n. 6.
>
> "Our decisions mandating jury consideration of mitigating circumstances provide no support for petitioner's claim because 'residual doubt' about guilt is not a mitigating circumstance. We have defined mitigating circumstances as facts about the defendant's character or background, or the circumstances of the particular offense, that may call for a penalty less than death. [citations omitted]. 'Residual doubt' is not a factor about the defendant or the circumstances of the crime. It is instead a lingering uncertainty about facts, a state of mind that exists somewhere between 'beyond a reasonable doubt' and 'absolute certainty.'"

Id., at 187-188.[4]

The appellant argues that the prosecutor improperly urged the trial court to disregard the jury's verdict. However, the record indicates that the prosecutor stated, "[T]he Court should consider the jury's verdict"; however, she urged the trial court to override the jury's recommended sentence because, she argued, it was based on emotion rather than on evidence. The prosecutor may formulate reasonable arguments from the evidence. Emotion, sympathy, and passion are not proper sentencing considerations. See Beck v. State, 396 So.2d 645, 663 (Ala. 1980). Moreover, a jury verdict override is permitted in Alabama by § 13A-5-47(e), Code of Alabama 1975, and such a statute has been held constitutional. See Proffitt v. Florida, 428 U.S. 242, 252 (1976).

The appellant argues that the prosecutor improperly argued that the appellant should be sentenced to death because she had not been "battered" by the victim and therefore the fact that she had been abused could not be considered as a nonstatutory mitigating circumstance. However, the prosecutor's comment referred to the fact that the appellant's motive was strictly money or legitimization of an extramarital affair, rather than because she had been abused by the victim. The record indicates that evidence had been introduced during the guilt phase of the trial that the appellant was battered and abused by the victim. The prosecutor's comment was proper argument against a nonstatutory mitigating

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[4]This latter quote is taken from Justice O'Conner's concurring opinion, which was joined in by Justice Blackmun.

circumstance that could have been considered by the trial court; i.e., because the appellant's background is a proper consideration under Lockhart v. Ohio, supra, the fact that she had or had not been battered by her husband could have been considered by the trial court in sentencing.

The appellant also argues that the prosecutor improperly commented on the appellant's lack of remorse. However, this comment was a proper inference from the evidence, because testimony had been introduced at trial that the appellant's reaction to being informed of her husband's death was so unemotional that she was questioned concerning her reaction. Her response was that she and the victim had suffered marital problems.

The appellant argues that the prosecutor improperly referred to her father's death, which was irrelevant to the instant case, and inferred that he was killed in the same manner as the victim in the present case. The following occurred during the closing arguments by the prosecutor:

> "[PROSECUTOR]: The Court had asked earlier about the testimony about her father dying and the circumstances surrounding that. We would refer the Court to the notes and, of course, the transcript is not ready, but the Court might could take its mind back to the testimony of Dorinda Hinton, the Sheriff's Investigator. Just before cross-examination, Investigator Hinton told the jury and the Court about her conversations with the defendant, and in addition to the comments about McCarter was a wonderful lover, she was asked and talked about what she said about her father. And Hinton testified before this Court, that this defendant, the night he was killed and she was informed of it, said my father was killed just like that. And, of course, our facts are the Deputy Sheriff is killed in an ambush by a shotgun. Not only that, but I believe the testimony will show that when this defendant testified she was asked on cross-examination if she said that and if it were true and I believe the record would show that she did say that. So that's the basis, from our perspective, of where that evidence came from. Certainly we are not asking this Court to find her guilty of her father's death, that's not why it was brought out, but to show her mental state, her emotional state at the time she was informed of his death."

The record indicates that during the course of the trial, State's witness Dorinda Hinton testified that, after being told of her husband's death, the appellant stated to Hinton that her father had been killed like the victim. Subsequently, during defense counsel's direct examination, the appellant testified that she was in her "20's" when her father died by gunshot. Thus, the prosecutor's argument was a correct comment on the evidence. Moreover, although the reference to this evidence may have unduly prejudiced the appellant, any error did not rise to the level of "plain error." "'Plain error is error which, when examined in the context of the entire case, is so obvious that failure to notice it would seriously affect the fairness, integrity, and public reputation of the judicial proceedings.'" Kuenzel v. State, supra, at 489, quoting United States v. Butler, 792 F.2d 1528, 1535 (11th Cir.), cert. denied, 479 U.S. 933 (1986).

XVII

The appellant argues that the State failed to establish sufficient evidence to sustain her conviction of capital murder and her sentence of death. Specifically, the appellant argues that the State failed to satisfy its burdens in two respects: the State, she argues, failed to provide sufficient corroboration of

accomplice testimony, and failed to prove that the murder was committed for pecuniary gain.

The record indicates that neither Patterson nor Trimble were accomplices. In the present case the question of complicity constituted a question of fact for the jury to decide and, by its verdict, it is clear that it found sufficient corroboration of accomplice testimony. Patterson was present with the majority of the coconspirators during the commission of the offense. He testified to a female voice broadcasting over McCarter's beeper the message "He is leaving." Trimble testified that he was solicited by the appellant to commit the offense. Moveover, she was implicated by her conduct upon learning of her husband's death and by her statement that, if McCarter committed the offense, she did not tell him to do so. Moreover, she admitted to her affair with McCarter and to having had marital problems with the victim.

> "A conviction of felony cannot be had on the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with such commission of the offense, and such corroborative evidence, if it merely shows the commission of the offense or the circumstances thereof, is not sufficient."

§ 12-21-222, Code of Alabama 1975. The State presented corroborative evidence to connect the appellant with the commission of the offense.

Furthermore, the State presented sufficient evidence to support the pecuniary gain element of the capital charge. Trimble testified that the appellant told him on the telephone that the murder should be committed by Friday to prevent the victim from spending the insurance money. McCarter testified that the

appellant provided $100 initially to pay Sockwell and Hood to commit the murder, with the promise of more when the appellant collected the insurance money.

Moreover, the State also provided sufficient evidence that the appellant hired Sockwell and Hood to murder her husband. Thus, under both theories, the State presented sufficient evidence to support the conviction and the aggravating circumstance of murder for pecuniary gain.

XVIII

The appellant argues that the trial court's instructions during the guilt phase of her trial, violated the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 1, 6, and 15 of the Constitution of Alabama. The record indicates that the appellant failed to object to any of these allegations of error and, therefore, these instances must be analyzed pursuant to the "plain error" doctrine.

The appellant argues that the trial court failed to instruct the jury that the State was required to prove that she knew about her husband's insurance and retirement benefits before she could be found guilty of committing murder for pecuniary gain. The record indicates that the trial court charged the jury that it must be convinced that the appellant committed the intentional murder and that the murder was committed for a pecuniary gain or pursuant to a contract for hire. This language substantially tracks the language of § 13A-5-40(a)(7), Code of Alabama 1975. "A charge which tracks the identical language of the statute is proper.

Jordan v. State, 17 Ala.App. 575, 87 So. 433, cert. denied, 205 Ala. 114, 87 So. 434 (1920)." King v. State, 595 So.2d 539 (Ala.Cr.App. 1991). Moreover, charges which track the language of a Code section are sufficient. See generally Salter v. State, 578 So.2d 1092, 1096 (Ala.Cr.App. 1990), writ denied, 578 So.2d 1097 (Ala. 1991).

Although the appellant argues that the trial court did not adequately instruct the jury on the lesser-included offense of murder, a review of the trial court's entire charge reveals that the appellant's argument is without merit. The trial court instructed the jury on intentional murder, as a separate offense, and emphasized the distinction between the two offenses. Ex parte Kennedy, 472 So.2d 1106 (Ala. 1985), cert. denied, 474 U.S. 975 (1985).

Although the appellant argues that the trial court erred in failing to charge the jury on the lesser-included offense of reckless murder, clearly the evidence would not have supported such a charge. Reckless murder requires conduct that creates a great risk of death to human life in general. Fisher v. State, 587 So.2d 1027 (Ala.Cr.App. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1486, 117 L.Ed.2d 628 (1992). The evidence presented in the present case shows that the murder was committed after laying in wait for and ambushing Isaiah Harris. Therefore, a charge on universal malice or reckless murder would have been improper.

The appellant claims that the trial court failed to instruct the jury that a particularized intent to kill must be proved beyond

a reasonable doubt. However, a review of the trial court's entire charge reveals that the jury was charged as to the requisite particularized intent to kill. Similarly, although the appellant argues that the trial court's instruction on corroboration of accomplice testimony was insufficient, a review of the charge establishes that the appellant's claim is without merit.

The other claimed errors by the appellant in the trial court's oral charge to the jury, are either legally incorrect[5] or do not constitute plain error.[6]

XIX

The appellant contends that the trial court's imposition of the death sentence, after the jury returned a verdict of life imprisonment without parole, violated her constitutional rights. Generally, the appellant argues that the trial court's override of the jury's recommended verdict was standardless and arbitrary. However, the constitutionality of Alabama's statutory sentencing scheme was approved by the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242, 252 (1976), and the jury verdict override

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[5]For example, the appellant argues that the trial court's instruction about promises received by McCarter was misleading, because it suggested that the promise that the State would not seek the death penalty was not binding because the court was not a party.

[6]The appellant cites as error the trial court's failure to define the term "a crime of moral turpitude." Moreover, the appellant cites as error the trial court's reference during his oral charge to the "State of Alabama, figuratively, the people of this community [who] come into this courtroom by and through their representatives from the District Attorney's Office." However, a review of the context of this language clearly demonstrates that the trial court was instructing the jury on the importance of its role in the judicial system.

provisions were specifically found constitutional in Spaziano v. Florida, 468 U.S. 447, 457-67 (1984). Pursuant to § 13A-5-47(e), Code of Alabama 1975, "[t]he trial court and not the jury is the sentencing authority". Freeman v. State, 555 So.2d 196, 213 (Ala.Cr.App. 1988), affirmed, 555 So.2d 215 (Ala. 1989), cert. denied, 496 U.S. 912 (1990). "The trial court is authorized to reject the jury's recommendation of life without parole when imposing sentence and to impose a death sentence." Id. See also Tarver v. State, 500 So.2d 1232, 1251 (Ala.Cr.App.), affirmed, 500 So.2d 1256 (Ala. 1986), cert. denied, 482 U.S. 920 (1987); Thompson v. State, 542 So.2d 1286, 1300 (Ala.Cr.App. 1988), affirmed, 542 So.2d 1300 (Ala. 1989), cert. denied, 493 U.S. 874 (1989).

Although the appellant argues that the jury verdict override standards adopted by Florida in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975) are constitutionally required, this court has previously rejected that argument. See White v. State, 587 So.2d 1218 (Ala.Cr.App. 1990), affirmed, 587 So.2d 1236 (Ala. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 979, 117 L.Ed.2d 142 (1992), citing Ex parte Jones, 456 So.2d 380, 381-82 (Ala. 1984), cert. denied, 470 U.S. 1062 (1985). See also Hadley v. State, 575 So.2d 145 (Ala.Cr.App. 1990).

Moreover, the appellant claims that the trial court's override of the jury's recommendation of a sentence of life without parole was fundamentally unfair in the present case for a number of reasons: because it considered allegedly inadmissible evidence, specifically a presentence report and statements of the appellant's

codefendants; because the prosecutor's argument at the sentence hearing was allegedly improper; because the trial court based its death sentence on the aggravating circumstance of pecuniary gain for which there was insufficient evidence; because the trial court failed to weigh the mitigating circumstance that the appellant had no significant history of prior criminal activity; and because the trial court allegedly failed to consider the jury's recommended verdict of life without parole. Because this court has previously held in this opinion that there was sufficient evidence presented by the State to support the aggravating circumstance of pecuniary gain and that the prosecutor's argument during the sentencing hearing was proper, these claims will not be discussed.

Moreover, this court has previously held that presentence reports are admissible evidence, which may be considered by a trial court in sentencing a defendant to death, provided the information contained therein is relevant to sentencing and the defendant has an opportunity to rebut this evidence. See Thompson v. State, 503 So.2d 871, 880-881 (Ala.Cr.App. 1986), affirmed, 503 So.2d 887 (Ala.), cert. denied, 484 U.S. 872 (1987).

> "It is clear to this Court that the use of the presentencing report is consistent with Ala. Code 1975, § 13A-5-45(d), Alabama's capital murder statute which states:
>
> > "'Any evidence which has probative value and is relevant to sentence shall be received at the sentence hearing regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements. This subsection shall not be construed to authorize the introduction of any evidence secured in violation

of the Constitution of the United States or the State of Alabama.'

"The entire report itself is an out-of-court statement and is entirely hearsay; however, it is admissible under the Ala. Code 1975, § 13A-5-47. Thompson v. State, supra. The trial court is not obligated to do more than provide a fair opportunity for rebuttal; where the record indicates that the defendant was given sufficient opportunity to rebut any hearsay statements made at the sentencing hearing, there is no error. Johnson v. State, 399 So.2d 859 (Ala.Crim.App. 1979), aff'd in part and rev'd on other grounds, 399 So.2d 873 (Ala. 1981)."

Ex parte Davis, 569 So.2d 738, 741 (Ala. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 1091, 112 L.Ed.2d 1196 (1991). In the present case, the appellant was provided a copy of the presentence report and was provided the opportunity rebut the statements in the report, and in fact did so.

Furthermore, the statements by the codefendants were admissible, because they were relevant to sentencing and had probative value. Additionally, the record indicates that the appellant requested the trial court to consider one of her codefendant's statements; therefore, any alleged error would have been invited. Gibson v. State, 555 So.2d 784, 797 (Ala.Cr.App. 1989). For a full discussion of this issue see Part XX, infra.

The record indicates in the trial court's written sentencing order that the trial judge in fact found the existence of the mitigating circumstance that the appellant had no prior criminal history. In the sentencing order the trial court stated:

"In weighing the aggravating and mitigating circumstances, the Court is aware of the nature of the process as defined in Section 13A-5-48. It is not a matter the Court takes lightly. After carefully considering the matter, the Court is convinced that the

one statutory aggravating circumstance found and considered far outweighs all of the non-statutory mitigating circumstances, and that the sentence ought to be death."

It is this statement by the trial court that it weighed all of the nonstatutory mitigating circumstances without referring any statutory mitigating circumstances on which the appellant bases her claim. However, in its sentencing order the trial court also stated that: "Section 13A-5-51(1) mitigating circumstance is present. The defendant has no criminal history." Moreover, following this hearing, a hearing was held on the State's motion, filed pursuant to Rule 10(f), A.R.App.P., during which the trial court indicated that it had considered this statutory mitigating circumstance. Because the sentencing order clearly states that the trial court found the existence of this mitigating circumstance and that it weighed the aggravating circumstance against the statutory and nonstatutory mitigating circumstances, as required by § 13A-5-48, Code of Alabama 1975, we find no error in the instant case.

Finally, the sentencing order clearly indicates that the trial court also considered the jury's advisory verdict. The jury recommended a sentence of life without parole by a vote of seven to five. There is no indication in the record that the trial court failed to consider this advisory sentence.

XX

The appellant argues that the trial court erroneously considered statements made by codefendants Sockwell and Hood during the sentencing hearing at which the jury's advisory verdict was overridden. The appellant bases this claim on the grounds that she

was not given an opportunity to cross-examine these codefendants or to challenge the reliability of their confessions. No objections were raised by the appellant on these grounds during the sentencing hearing, thus any claimed error must rise to the level of plain error. Rule 45A, A.R.App.P. This failure to object weighs against any claim of prejudice. Ex parte Womack, 435 So.2d 766, 769 (Ala.), cert. denied, 464 U.S. 986 (1983). Moreover, the record indicates that it was the appellant who requested that one of the codefendant's statements be considered.

During the sentencing hearing, defense counsel stated as follows:

> "Your Honor, we have reviewed the report of the sentencing department that you've ordered and we have some objections to the report. I guess we should address those right now. In regard -- we do not have an objection to the conclusion reached in the recommendation of life without parole but in case the Court is to rely on the report, we object to that part of the report, whereby the presentencing department has stated that Louise Harris was identified by all of the co-defendants as having planned the murder. We would submit the statement or request that the statement of Alex Hood be entered and we say that that does not support it by the evidence."

Thereafter, in examining the parole officer who prepared the presentence report, defense counsel elicited testimony that the officer had not considered the entire statements of the co-defendants, concluding that the evidence the officer had reviewed was an investigative report prepared by the police department. Thereafter, during the prosecutor's examination of this witness, he was asked if he had read the statements of McCarter, Hood, or

Sockwell. He responded that he had not read their specific statements. The trial court then stated as follows:

> "THE COURT: Let me interrupt for a minute. Did I not request this morning that you go get those statements? I want everybody to know this.
>
> "THE WITNESS: Yes, sir.
>
> "THE COURT: And I now have 'em, but I have not had an opportunity to read 'em since they weren't attached to the report. But for the record's sake and for this, I have requested those question and answer statements to be made a part of this report.
>
> "[PROSECUTOR]: State has no objection and would join in the motion of the defense as to Mr. Hood's, and we would also request the Court to consider the other two.
>
> "THE COURT: Well, I've requested all three."

"An accused cannot by his own voluntary conduct invite error and then seek to profit thereby." Spears v. State, 428 So.2d 174, 179 (Ala.Cr.App. 1982). "The invited error rule has been applied equally in both capital cases and noncapital cases." Rogers v. State, [Ms. 6 Div. 736, May 31, 1991] ___ So.2d ___ (Ala.Cr.App. 1991), reversed on other grounds, [Ms. 1910002, April 17, 1992] ___ So.2d ___ (Ala. 1992).

The appellant sought to introduce these statements by the codefendants in order to rebut the claim in the presentence investigation report that the accomplices identified her as having participated in the murder. Therefore, the codefendants' statements were relevant. Moreover, hearsay evidence, such as these statements, may be introduced and considered during the sentencing stage of the capital murder trial. See Henderson v. State, 583 So.2d 276 (Ala.Cr.App. 1990), affirmed, 583 So.2d 305

(Ala. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1268, 117 L.Ed.2d 496 (1992). See also § 13A-5-45(d) and (e), Code of Alabama 1975. Thus, because this evidence was relevant and because its introduction was requested by the appellant, admitting these statements did not constitute plain error.

XXI

The appellant argues that her sentence of death cannot stand because it was based on one aggravating circumstance, which she claims was inapplicable in her case. The appellant argues that the State failed to prove either that Sockwell and Hood were paid for the killing, or that the appellant would gain the insurance money and other benefits paid upon her husband's death. However, the record indicates that the State clearly proved the aggravating circumstance pursuant to both of these theories. The evidence established the pecuniary gain aggravating circumstance by showing that the appellant paid Hood and Sockwell each $50 for committing the offense. The pecuniary gain "aggravating circumstance should be considered as established where the defendant is convicted of the capital offense as an accomplice-hirer." Haney v. State, [Ms. 7 Div. 148, March 29, 1991] ___ So.2d ___ (Ala.Cr.App. 1991).

Furthermore, the State presented sufficient evidence to support the theory that the appellant had had her husband murdered in order to secure his insurance proceeds as well as other benefits. As previously discussed, McCarter testified that the appellant was aware of these benefits and that she wanted her husband killed in order to obtain them; McCarter further testified

that Sockwell and Hood were paid $50 each and were promised more when the appellant secured these monies; Trimble testified that the appellant wanted her husband murdered before he borrowed against too much of his insurance money; and the appellant admitted that she was familiar with her husband's pay-check and the fact that certain monies were withheld from it to provide for certain benefits. Thus, the State provided sufficient evidence of this aggravating circumstance.

XXII

The appellant argues that her sentence of death is disproportionate to sentences imposed on similar defendants under similar circumstances. Specifically, she refers to the fact that Lorenzo McCarter did not receive the death sentence and that other cases exist, involving similar crimes, in which defendants did not receive a sentence of death.

It is clear that, upon her conviction for murder for pecuniary gain, the appellant was eligible for a sentence of death. § 13A-5-50(7), Code of Alabama 1975. Moreover, similar penalties have been imposed in similar cases. See Williams v. State, 461 So.2d 834 (Ala.Cr.App. 1983), reversed on other grounds, 461 So.2d 852 (Ala. 1984); Haney v. State, supra; Heath v. State, 455 So.2d 898 (Ala.Cr.App. 1983), affirmed, 455 So.2d 905 (Ala. 1984), affirmed, 474 U.S. 82 (1985). Under the facts of this case, the appellant's sentence is proportionate to her crime and to sentences imposed in similar cases.

Lorenzo McCarter received a sentence of life without parole, after the State agreed to pursue only a sentence of life without parole, provided that he testify at the appellant's trial. As to the other appellants, Hood, the driver of the automobile, was convicted of the capital offense and was sentenced to life imprisonment without parole. Hood v. State, [Ms. 90-770, December 27, 1991] ___ So.2d ___ (Ala.Cr.App. 1991). Sockwell, the triggerman, was convicted of the capital offense and was sentenced to death. His appeal is now pending before this court. Thus, in the present case, the originator of the offense, who persisted and urged its undertaking and who provided the incentives for its completion, received the death sentence. Moroever, she was the victim's wife and, thus, his closest and most trusted relative. The triggerman also received the death sentence. The middleman, who was having an affair with the appellant and who arranged the liaison between the appellant and the actual murderers, received a sentence of life imprisonment, pursuant to his aid to the State in the case against the appellant. The driver of the automobile also received a sentence of life imprisonment. According to these individual roles in the present offense, we consider the appellant's sentence of death in this case to be proportionate to her accomplices.

XXIII

In accordance with § 13A-5-53, Code of Alabama 1975, we have reviewed the record, including the guilt and sentencing proceedings, for any error that ~~ad~~versely affected the rights of

the appellant, and we have found none. Nor do we find any evidence that the sentence was imposed under influence of passion, prejudice, or any other arbitrary factor.

The trial court properly found the existence of one aggravating circumstance: that the murder was committed for pecuniary gain. § 13A-5-49(6), Code of Alabama 1975. The trial court found the existence of one statutory mitigating circumstance, that the appellant has no criminal history. § 13A-5-51(1), Code of Alabama 1975. In his sentencing order, the trial court addressed the statutory mitigating circumstance defined by § 13A-5-51(4), stating that "[w]hile there were others involved and this defendant did not pull the trigger, her participation was such that, but for her, there probably would never have been a killing. She planned it, provided the financing and stood to benefit the most." We find no error in the trial court's holding that this statutory mitigating circumstance was not present in this case. As to the nonstatutory mitigating circumstances, the trial court wrote as follows:

> "Defendant's attorneys did a thorough job of presenting non-statutory mitigating circumstance evidence, and this Court has considered all of it.
>
> "The defendant had family and friends who cared about her and had relationships with her which were beneficial to them and her. She was a hard working and respected member of the community. She was a steady worker in her church and community. She was held in high regard by her employers and friends.
>
> "Some of the evidence was circumstantial and included the testimony of individuals with criminal histories and/or a pending charge. Counsel for the defendant did a thorough job ~~in~~ exploring all weaknesses of the State's case, including the credibility of

witnesses. This Court has no reason to go behind the guilty verdict of the jury and will not do so. This Court finds the defendant guilty beyond a reasonable doubt. This Court has carefully considered all of the non-statutory mitigating circumstance evidence proffered by the defendant. The Court has also given careful consideration to all of the defendant's contentions concerning non-statutory mitigating circumstances including all of the arguments of her attorneys and the contentions reflected in her proffered jury instruction listing mitigating circumstances. All of the defense's non-statutory mitigating circumstance evidence has been carefully considered. In entering the non-statutory mitigating circumstance findings, and the findings concerning statutory mitigating circumstances, the Court applied the burden of proof set out in Section 13A-5-45(g) and has gone further and resolved every legitimate doubt in the defendant's favor."

The trial court properly considered the nonstatutory mitigating circumstance provided by the appellant.

As to the weighing of these aggravating and mitigating circumstances, the trial court wrote:

"In weighing the aggravating and mitigating circumstances, the Court is aware of the nature of the process as defined in Section 13A-5-48. It is not a matter the Court takes lightly. After carefully considering the matter, the Court is convinced that the one statutory aggravating circumstance found and considered far outweighs all of the non-statutory mitigating circumstances, and that the sentence ought to be death."

After an independent weighing of the aggravating and mitigating circumstances in this case, we find that the evidence supports the trial court's conclusion and indicates that death was the proper sentence. The appellant's statements, actions, role in the offense, and the evidence supporting her guilt, lead us to this conclusion.

The sentence of death in this case is neither excessive nor disproportionate to the penalties imposed in similar cases,

considering both the crime and the defendant. See discussion at Issue XXII. Therefore, the appellant's conviction and sentence of death are proper, and the judgment of the circuit court is affirmed.

AFFIRMED.

All the Judges concur, except Montiel, J., who dissents with an opinion.

MONTIEL, JUDGE, DISSENTING

Does a defendant in a capital murder case, who is sentenced to death by electrocution, have an absolute right to be present during all pretrial proceedings relating to the case? I believe the answer is yes, because of the guarantees provided by the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fifth Amendment of the United States Constitution.

The majority opinion correctly concludes that the presence of a capital defendant at trial may not be waived by counsel. Profitt v. Wainwright, 685 F. 2d 1227 (1982). The right to participate in the preparation of a defense is a fundamental right afforded to all criminal defendants, especially in those cases in which the charge is punishable by death. The majority, however, ignores this basic right by concluding that "the appellant's presence [at a pretrial hearing] would have been useless to her defense" or that "she was not prejudiced by her absence". I cannot agree that the appellant was not prejudiced by her absence from numerous hearings.

The majority opinion further concludes that the appellant's right to a fair trial was not violated by the appellant's absence from certain pretrial proceedings; however, the record is silent as to which hearings the appellant did not attend. Should a capital defendant's conviction be upheld where the record concerning the basic constitutional issue presented in this case is incomplete? I believe that we must answer this question in the negative. This case should be remanded to the trial court for that court to supplement the record or to conduct a hearing to determine which pretrial hearings the appellant did not attend. Only with a complete record can this court determine with certainty whether the appellant's constitutional rights were violated.

Justice Harlan F. Stone once stated, "[T]he law itself is on trial in every case as well as the cause before it." This case is a trial on a capital defendant's right to be present at pretrial hearings. This court cannot ignore this right because of the difficult cause in which it is presented.

For the foregoing reasons, I respectfully dissent and I would remand this case to the trial court to supplement the record to reflect the appellant's presence at or absence from all pretrial hearings.

93-7650

ORIGINAL

CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached document has been served upon counsel for the State of Alabama, Robert Lusk, Esq., and Sandra Stewart, Esq., Office of the Attorney General, Alabama State House, 11 South Union Street, Montgomery AL 36130 by placing same in the United States Mail, postage prepaid.

This the 26th day of January, 1994.

Ruth E. Friedman

Ruth E. Friedman

ORIGINAL

No. 93-7659

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

LOUISE HARRIS,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF FOR THE STATE OF ALABAMA IN OPPOSITION TO CERTIORARI

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No. 93-7659

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

LOUISE HARRIS,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

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QUESTIONS PRESENTED FOR REVIEW

1. After the sentence phase of the trial, the petitioner's jury recommended, by a 7-to-5 vote, that she be sentenced to life imprisonment without parole. After considering that advisory verdict, in addition to all of the evidence presented at both the guilt and sentencing phases of trial, the presentence report, and the arguments of counsel, the trial court imposed the death sentence.

The issue presented is whether this Court should grant certiorari to review the petitioner's claims regarding the trial court's override of the jury's advisory verdict, when the claims do not present a federal question, when the claims were not properly raised below, when the claims are not worthy of certiorari review, and when the claims are meritless.

2. After the trial judge who had responsibility for imposing sentence in this case ordered that the petitioner receive the death penalty, the case was automatically reviewed pursuant to Alabama's capital murder statute. When it conducted its statutorily mandated review, the Alabama Court of Criminal Appeals conducted its independent weighing of the aggravating and mitigating circumstances, and held that death was the proper sentence. The Alabama Supreme Court, on certiorari review, held that the Court of Criminal Appeals correctly ruled on all sentencing issues, and affirmed the conviction and sentence.

The question presented is whether this Court should grant certiorari to review the petitioner's claims regarding appellate review of a death sentence imposed after an advisory jury recommends a life without parole sentence, when the claims were never before raised, when the claims involve only state law, when the claims are not worthy of certiorari review, and when the claims are meritless.

3. At the guilt phase of petitioner's capital murder trial, the jury was instructed without objection on the concept of guilt beyond a reasonable doubt. The question presented is whether this Court should grant certiorari to review the petitioner's claim regarding the reasonable doubt jury instruction, when the claim is being raised for the first time in this Court, when the claim is not worthy of certiorari review, and when the claim is meritless.

4. Although she never before objected to the trial court's reasonable doubt jury instruction, petitioner asserted that this case should be held pending this Court's decision in Sandoval v. California and Victor v. Nebraska. At issue is whether this Court should hold this case for any reason.

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JURISDICTION

The decision of the Alabama Supreme Court affirming the petitioner's conviction and death sentence was issued on June 25, 1993. Application for rehearing was overruled by that court on October 29, 1993.

This Court does not have jurisdiction over the issues raised here because none of them were properly raised in the courts below. Additionally, as to Questions I and II in the petition, this Court does not have jurisdiction because the issues presented are ones of state law and do not raise a federal question.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the constitutional and statutory provisions set out on page 2 of the petition, the following provisions are involved:

Section 13A-5-47(a) of the Alabama Code (1975) provides:

> After the sentence hearing has been conducted, and after the jury has returned an advisory verdict, or after such a verdict has been waived as provided in section 13A-5-46(a) or section 13A-5-46(g), the trial court shall proceed to determine the sentence.

Section 13A-5-44(c) of the Alabama Code (1975) provides, in relevant part:

> Notwithstanding any other provision of law, the defendant with the consent of the state and with the approval of the

court may waive the participation of a jury in the sentence hearing provided in section 13A-5-46.

Section 13A-5-45(a) of the Alabama Code (1975) provides, in relevant part:

> The sentence hearing shall be conducted as soon a practicable after the defendant is convicted. Provided, however, if the sentence hearing is to be conducted before the trial judge without a jury or before the trial judge and a jury other than the trial jury, as provided elsewhere in this article, the trial court with the consent of both parties may delay the sentence hearing until it has received the pre-sentence investigation report specified in section 13A-5-47(b).

Section 13A-5-46(a) of the Alabama Code (1975) provides, in relevant part:

> If both parties with the consent of the court waive the right to have the hearing conducted before a jury, the trial judge shall proceed to determine sentence without an advisory verdict from a jury.

Section 13A-5-46(g) of the Alabama Code (1975) provides:

> If the jury is unable to reach an advisory verdict recommending a sentence, or for other manifest necessity, the trial court may declare a mistrial of the sentence hearing. Such a mistrial shall not affect the conviction. After such a mistrial or mistrials another sentence hearing shall be conducted before another jury, selected according to the laws and rules governing the selection of a jury for the trial of a capital case. Provided, however, that, subject to the provisions of section 13A-5-44(c), after one or more mistrials both parties with the consent of the court may waive the right to have an advisory verdict from a

> jury, in which event the issue of sentence shall be submitted to the trial court without a recommendation from a jury.

Section 13A-5-47(d) of the Alabama Code (1975) provides:

> Based upon the evidence presented at trial, the evidence presented during the sentence hearing, and the pre-sentence investigation report and any evidence submitted in connection with it, the trial court shall enter specific written findings concerning the existence or nonexistence of each aggravating circumstance enumerated in section 13A-5-49, each mitigating circumstance enumerated in section 13A-5-51, and any additional mitigating circumstances offered pursuant to section 13A-5-52. The trial court shall also enter written findings of facts summarizing the crime and the defendant's participation in it.

Section 13A-5-47(e) of the Alabama Code (1975), only part of which is quoted by the petitioner and is incorrectly cited as section 13A-5-47(3) at page 2 in the petition, provides:

> In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict, unless such a verdict has been waived pursuant to section 13A-5-46(a) or 13A-5-46(g). While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.

Section 13A-5-53(b), Alabama Code (1975) provides:

> In determining whether death was the proper sentence in the case the Alabama court of criminal appeals, subject to

review by the Alabama supreme court, shall determine:

> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;
>
> (2) Whether an independent weighing of the aggravating and mitigating circumstances at the appellate level indicates that death was the proper sentence; and
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Rule 45A of the Alabama Rules of Appellate Procedure provides:

> In all cases in which the death penalty has been imposed, the court of criminal appeals shall notice any plain error or defect in the proceedings under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial right of the appellant.

STATEMENT

Proceedings Below

On May 6, 1988, the petitioner was indicted by a Montgomery County grand jury and was charged with two counts of capital murder in the shooting death of her husband, Deputy

Isaiah Harris. (R. 1063)[1] On July 13, 1989, the jury found the petitioner guilty of murder for pecuniary gain or pursuant to a contract for hire. (R. 1063) The jury then returned its advisory verdict, recommending that the petitioner receive a life without parole sentence; seven of the jurors recommended the penalty of imprisonment and five of the jurors recommended the death penalty. (R. 1066)

On August 11, 1989, the trial court considered all of the evidence presented, the presentence report, the contentions of the parties, and the jury's advisory verdict, and ordered that the petitioner be sentenced to death. (R. 1254)

On June 12, 1989, the Alabama Court of Criminal Appeals affirmed the capital conviction and death sentence. Harris v. State, No. 3 Div. 332 (Ala.Crim.App. June 12, 1992). On June 25, 1993, the Alabama Supreme Court affirmed the judgment of the Court of Criminal Appeals. Ex parte Harris, No. 1920374 (Ala. June 25, 1993).

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[1] "R. __" refers to the page number(s) of the trial record.

Facts Presented at Trial

The Alabama Court of Criminal Appeals set forth the facts from the guilt phase of trial in its June 12, 1989 opinion as follows:

> The record indicates that the appellant was involved in an affair with Lorenzo McCarter, a codefendant, while she was married to Harris. The appellant and Harris had experienced marital problems in the past, which the victim apparently believed he had solved when he promised to buy the appellant a house. The record indicates that the appellant asked McCarter to hire someone to kill her husband. McCarter approached a co-employee about doing "the job"; however, the co-employee refused and told his supervisor about the solicitation. McCarter then approached Michael Sockwell and Alex Hood, other codefendants, to commit the offense. McCarter knew that Sockwell owned a gun. Prior to the offense, the appellant met with the three men and was shown the gun. Sockwell and Hood were paid $100 in advance to commit the offense, with the promise that more money would be paid upon completion of the murder. The State presented evidence of the existence of various insurance policies on the victim's life, with the appellant specified as the beneficiary.
>
> The victim, who worked the night shift as a jailer, left his home at approximately 11:00 p.m. to go to work, after being awakened by the appellant a little later than usual. Immediately after Harris left home, the appellant paged McCarter on his beeper, giving the message that her husband was leaving. There was evidence that the appellant had paged McCarter on his beeper many times in the past to arrange liaisons. When he received the message in the instant case,

> McCarter was seated in Hood's car, located across the street from the entrance to the subdivision in which Harris and appellant lived. Also present in the car were Alex Hood and Freddie Patterson. Patterson was unaware of the conspiracy. Sockwell was hidden behind the hedge located at the entrance to the subdivision. Harris was driving to work in his own 1979 black Ford Thunderbird automobile. When Harris stopped at the stop sign at the entrance of the subdivision, Sockwell shot him once in the face at close range with a shotgun. As a result, the lower half of the victim's face was blown off, leaving his teeth, tongue, and "matter" from his face blown across the car. After the shot, the victim's vehicle traveled slowly across the highway and came to a stop in a ditch.
>
> When the victim failed to arrive at work by 11:25 p.m., a co-employee telephoned his home twice and spoke with the appellant. There was testimony that the appellant offered no assistance and that her speech was slow or sluggish. Two men, returning from work, discovered the victim's body shortly after midnight and telephoned the Montgomery Police Department. After the police arrived at the scene and identified the victim, several officers of the police department and employees of the Montgomery County Sheriff's Department went to the house of the victim and the appellant to notify the appellant of the victim's death. There was testimony that, upon being notified of the victim's death, the appellant began screaming and sobbing, but she shed no tears. Moreover, she became completely calm instantly in order to answer questions. A member of the Montgomery County Sheriff's Department, who knew both the appellant and the victim, testified that she asked the appellant why she did not appear to be upset, and that the appellant responded that she and the victim had been

> experiencing marital problems for some time. She also told the witness that she had engaged in several extramarital affairs, the current one being with Lorenzo McCarter. The appellant stated that she was in love with McCarter. In response to questions asked by an investigator with the sheriff's department, she responded that McCarter's car was broken down in the vicinity, and when asked if McCarter could have killed the victim, the appellant responded, "If he did kill him I didn't tell him to." At trial, McCarter elected to testify against the appellant, in exchange for the prosecutor's promise not to seek the death penalty in his case.

Harris v. State, slip op. at 2-4.

As to the evidence offered as mitigation, it was not so favorable to the petitioner as she, in all likelihood, wishes it had been, or as favorable as she alleges in her petition that it was. While it is true that the petitioner located witnesses who testified favorably about her, it is also true that those witnesses knew nothing of the petitioner's extramarital affair with her capital murder co-defendant; they knew nothing of the petitioner's association with Michael Sockwell and Alex Hood; they knew nothing of the petitioner's demand that the victim buy her a house so she would not terminate their relationship; and they knew nothing of the petitioner's repeated liaisons with McCarter that took place in her home with her children present. (E.g., R. 689-690, 692, 693, 697) In sum, the evidence offered in mitigation was not as substantial as the petitioner wished it had been.

In deciding the petitioner's sentence, the trial court carefully followed the mandates of the statute and considered the jury's advisory sentencing verdict, all of the evidence, and the presentence report. (R. 1254) The trial court found one statutory aggravating circumstance, that the capital murder was committed for pecuniary gain, §13A-5-49(6), Alabama Code (1975), and one statutory mitigating circumstance, that the petitioner had no significant history of prior criminal activity, §13A-5-51(1), Alabama Code (1975). (R. 1254-B) The court also found as non-statutory mitigation that the petitioner was a hard working, respected member of her community who was held in high regard by friends and employers. (R. 1254-C) The trial court, as mandated by Alabama statute, weighed the aggravating circumstance against the mitigating circumstances, and upon determining that the single aggravating circumstance outweighed the mitigating circumstances, imposed the death sentence. (R. 1254-D, 1256; supplemental record of March 7, 1991 at pp. 7-8) At page 5 of the petition, the petitioner erroneously states that the trial court "substituted its judgment for that of the jury." Because the trial court, not the jury, is the only sentencing authority in a capital case in Alabama, the trial court imposed the first and only sentencing judgment in this case. Thus, petitioner's statements on page 5, regarding the "practice of substituting sentencing judgments" are based on

the incorrect premise that juries in Alabama impose sentencing judgments. Moreover, the petitioner's claims on page 5 regarding the number of cases in which trial courts have imposed the death sentence after a jury recommended a life without parole sentence, and about ways in which trial courts considered (or failed to consider) jury recommendations, are not based on any record evidence and are unsupported by any citation. The State specifically denies any and all allegations that trial courts improperly sentence capital defendants.

In affirming the conviction and death sentence, the appellate courts conducted their review in accordance with the capital statute, §13A-5-53, Alabama Code (1975), which does not require further consideration or discussion of the jury's recommendation of sentence.

Finally, as to the reasonable doubt jury charge, the petitioner neglected to include two important points in her petition. First, before the trial commenced, the petitioner requested that the court instruct the jurors before opening arguments that the petitioner was presumed innocent until they were convinced of her guilt "beyond a reasonable doubt and to a moral certainty" and that a reasonable doubt existed when the jurors were not convinced "to a moral certainty" that the petitioner was guilty. (R. 1200-1203) The petitioner equated reasonable doubt with moral certainty five times in the brief

motion to the trial court regarding the pretrial jury instruction. In accordance with the petitioner's request, the trial court read the requested instructions to the venire before the jury was selected. (R. 107-112)

When the jury was later instructed on the State's burden of proof and the trial court defined reasonable doubt, the petitioner entered no objections. Moreover, the petitioner failed to raise any objection to the instruction until she filed her petition in this Court.

ARGUMENT

CERTIORARI SHOULD NOT BE GRANTED ON PETITIONER'S CLAIM THAT ALABAMA'S CAPITAL STATUTE PROVIDES NO STANDARD TO GUIDE A TRIAL COURT'S IMPOSITION OF A DEATH SENTENCE AFTER THE ADVISORY JURY RECOMMENDS A SENTENCE OF LIFE IMPRISONMENT WITHOUT PAROLE.

The petitioner contends that Alabama's capital murder statute is unconstitutional because it permits trial courts to reject capital sentencing verdicts without reference to any articulated standard. Certiorari should be denied on this claim for at least four reasons.

A. This Court Should Deny Certiorari Because The Issue Does Not Present A Federal Question.

The petitioner claims that Alabama's capital murder statute provides for constitutionally protected jury

sentencing verdicts and that the trial court in this case erroneously imposed the death penalty after the jury recommended a sentence of life imprisonment without parole. This claim involves matters of state law only. It involves the Alabama courts' interpretation and application of the sentencing procedures in Alabama's capital statute and is therefore not proper for certiorari review. 28 U.S.C. §1257(3).

B. This Court Should Deny Certiorari Because The Claims Were Not Properly Raised Below.

The petitioner failed to raise in the trial court any issues regarding the trial court's override of the jury's sentencing recommendation. The Alabama appellate courts, therefore, could only have addressed her claims pursuant to the Alabama procedural rule, Rule 45A, A.R.A.P., and determined that no plain error occurred. The application of Alabama's plain error rule is strictly a matter of state law. A state may apply its own appellate rules of procedure and may defeat a claim based on that independent state law.

Because the petitioner's claims regarding the rejection of the jury's advisory verdict were not properly raised below, this Court has no jurisdiction to consider them and it should deny certiorari.

C. This Court Should Deny Certiorari Because The Claims Are Not Worthy Of Certiorari Review.

The petitioner's claims regarding the trial court's imposition of the death sentence after the jury recommended that she receive a sentence of life imprisonment without parole is not worthy of certiorari review. The demands on this Court's time mandate that it select for review only those few truly important cases with wide ranging impact. This is not such a case.

The propriety of the death sentence for this woman, who contracted for her husband's murder, is a fact-specific question that was carefully considered by the state courts. Review of the sentencing question is better left to those courts because it has no application beyond the unique facts of this case.

As to the claims involving the sentencing provisions of Alabama's statute, that issue, too, has been resolved by the Alabama courts and need not take up the limited time available in this Court. E.g., Ex parte Giles, No. 1920375 (Ala. October 29, 1993). As to the broader claims regarding the propriety of judicial override of jury recommendations, those issues have also been decided adversely to the petitioner. See Proffitt v. Florida, 428 U.S. 242, 252 (1976); Spaziano v. Florida, 468 U.S. 447, 457-467 (1984).

Because this case presents no issues proper for certiorari review by this Court, such review should be denied. Sup. Ct. R. 10.1.

D. This Court Should Deny Certiorari Because The Claims Are Without Merit.

The petitioner asserts that the jury had a constitutionally protected verdict and that it was improperly rejected without reference to any standards. None of the components of this claim has any merit.

First, the petitioner incorrectly implies that the jury in capital cases in Alabama imposes the sentence and that this verdict is constitutionally "immune" from judicial override. Alabama statute provides otherwise. The trial court, not the jury, is the sentencing authority in Alabama. §13A-5-47(a), (e), Alabama Code (1975). The statute provides that a jury may be called upon to give an advisory verdict of death or life imprisonment without parole, §13A-5-46, Alabama Code (1975), however, a jury is not required. Section 13A-5-44(c), Alabama Code (1975), provides that a defendant may waive jury sentencing, and in that case the trial judge determines sentence without an advisory verdict, §13A-5-46(a), Alabama Code (1975). The petitioner correctly notes that if a hearing is held before a sentencing jury and the jury cannot reach an advisory recommendation, the trial court may declare a mistrial. §13A-5-46(g), Alabama Code (1975). She fails to

note, however, that the same statutory provision allows for a waiver of the right to an advisory verdict from the jury, and provides for sentencing by the trial court without a jury recommendation.

Thus, while a defendant may receive a recommended sentence in a capital case, jury participation may be waived at various points in the proceeding, and the case can be submitted to the trial court - the ultimate sentencing authority - without a jury's advisory verdict. See also §13A-5-45(a), Alabama Code (1975).

Second, there is no merit to the petitioner's claims that the Alabama statute permits a trial court to override a jury's advisory verdict in a standardless and haphazard way. In determining sentence, the trial court is required to consider all of the evidence from trial and the presentence investigation report; to determine what statutory aggravating and mitigating circumstances exist; to determine what non-statutory mitigating circumstances exist; to determine whether the aggravating circumstances outweigh the mitigating circumstances; to consider the jury's non-binding sentence recommendation, if one was made; and to enter written sentence findings. §13A-5-47(d), (e), Alabama Code (1975). These are the standards provided in the Alabama capital sentencing scheme which prevent the arbitrary and discriminatory application of a death sentence and are all the standards the

Eighth Amendment requires. Simply because Alabama does not have a defined standard of review where a trial judge overrides a sentence recommendation in sentencing a defendant to death like that in Tedder v. State, 322 So.2d 908 (Fla. 1975), does not mean that a death sentence is arbitrarily imposed. Alabama's capital sentencing scheme is certainly not standardless.

Moreover, the petitioner states at page 9, "The jury's verdict is carefully guided by specific statutory requirements that direct the finding, consideration and weighing of aggravating and mitigating circumstances. Ala. Code §13A-5-46(e)(1975)." These guiding standards of which the petitioner approves are precisely the same standards that the statute imposes on trial courts. §§13A-5-47(e), 13A-5-48, Alabama Code (1975). The petitioner has implicitly conceded that the trial court's sentencing decision is guided by standards that satisfy the Constitution.

Third, the petitioner's claim that the death sentence in this case was unguided and inappropriate is also meritless. The trial court fully complied with the requirements of the sentencing provisions of the Alabama statute set forth above, including giving consideration to the jury's advisory verdict. This petitioner murdered her husband for money and/or to be rid of him so she could more easily maintain her relationship with her boyfriend. The only evidence she

offered in mitigation was "character evidence" from individuals who knew nothing of her sexual improprieties, her association with criminals, or her other negative characteristics. On the facts of this case, the trial judge's decision that death was the proper sentence was correct, and it was entered in full accord with the law.

For all of these reasons, certiorari should be denied.

II.

CERTIORARI SHOULD NOT BE GRANTED ON THE CLAIM THAT APPELLATE REVIEW OF JURY VERDICT OVERRIDE IS INADEQUATE.

The petitioner claims that appellate review of cases in which a death sentence is imposed after a jury recommends a sentence of life imprisonment without parole is inadequate and that there is no mechanism to ensure evenhandedness. She also claims that the appellate courts reviewing her case denied her meaningful appellate review. Certiorari should be denied for at least four reasons.

A. This Court Should Deny Certiorari Because It Has No Jurisdiction To Consider These Claims Because They Were Never Before Raised.

The petitioner has never before raised claims regarding improper appellate review of death sentences imposed following jury recommendations of life imprisonment without parole.

This Court has no jurisdiction to consider issues not raised or addressed in lower courts, Street v. New York, 394 U.S. 576 (1969), so certiorari should be denied.

B. This Court Should Deny Certiorari Because The Issue Does Not Present A Federal Question.

The claims regarding appellate review of death sentences imposed by Alabama trial courts following jury recommendations of life imprisonment without parole are matters governed by the Alabama statute. §§13A-5-53, 13A-5-55, Alabama Code (1975). The same appellate review provisions apply in cases in which death sentences were imposed following jury recommendations of death. In each category of cases, the Alabama Court of Criminal Appeals, subject to review by the Alabama Supreme Court, is directed to determine whether the death sentence imposed by the trial court was the proper sentence. While the ultimate sentencing result may be reviewable, the procedure used to reach that result is a state law procedure, and is not an issue for federal courts to review. Spaziano v. Florida, 46 U.S. 447, 465 (1984).

Because the claims do not raise a federal question, certiorari should be denied.

C. This Court Should Deny Certiorari Because The Claims Raised Are Not Worthy Of Certiorari Review.

The claims raised here involve the appellate review of Alabama death sentences, in general, and of the petitioner's death sentence, specifically. These claims are not worthy of certiorari review.

As to the appellate review of death sentences imposed after a jury recommends life imprisonment without parole, Alabama's sentencing scheme was upheld by this Court in Proffitt v. Florida, 428 U.S. 242, 252 (1976), so further consideration of the statute is not warranted. As to the appellate review of the petitioner's death sentence, the claims are purely fact-based and have no application beyond the scope of this case.

For these reasons, the claims are not worthy of certiorari review.

D. This Court Should Deny Certiorari Because The Claims Are Meritless.

The petitioner claims that appellate review of jury verdict overrides is inadequate and does not ensure evenhanded application, and that no appellate analysis of the death sentence was performed in her case. Both contentions are false.

The Alabama capital statute requires the Court of Criminal Appeals to determine whether the death sentence was imposed under any arbitrary influence, whether an independent weighing of the aggravating and mitigating circumstances at the appellate level indicates that death is the proper sentence, and whether the death sentence is excessive or disproportionate, §13A-5-53(b), Alabama Code (1975). Review of the death sentence is guided by concise standards that apply in every case, whether the jury recommended a death sentence or a sentence of life imprisonment without parole. There is no specific provision requiring an appellate court to consider the jury's verdict, because the death sentence imposed by the trial court, the ultimate sentencing authority, is the subject of appellate review. Thus, it is understandable that the appellate court often does not refer to the jury's recommendation when it is conducting the independent weighing on the appellate level.

This review process does not lessen the consistency in the sentencing procedures mandated by the statute and followed by the trial courts. And contrary to the petitioner's statement at page 20, the review process assures

evenhandedness by imposing the same review standards on the appellate court for every death sentence it reviews.[2]

As to the appellate court review of the petitioner's death sentence, the Alabama Court of Criminal Appeals specifically found that the trial court considered the advisory verdict but concluded after its independent weighing that the death sentence was proper. Harris v. State, slip op. at 75, 82. The appellate court also independently weighed the aggravating and mitigating circumstances and held that death was the proper sentence. Id. at 82. The Alabama Supreme Court held that the lower court correctly resolved the issues addressed in the opinion. The appellate courts conducted the review required by Alabama statute, so no error occurred. Certiorari should be denied on this issue.

III.

CERTIORARI SHOULD BE DENIED ON THE REASONABLE DOUBT JURY INSTRUCTION CLAIMS.

The petitioner contends that the trial court's jury charge on reasonable doubt violated Cage v. Louisiana, 498

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[2]The petitioner states at page 20 that a capital defendant may be subject to override in one court but not another. This is patently false. Because the trial judge is the sentencing authority, every defendant is subject to override in every court.

U.S. 39 (1990). Certiorari should be denied on this claim for at least three reasons.

A. This Court Should Deny Certiorari Because The Claim Was Never Before Raised.

The petitioner raised no objection in any court below to the reasonable doubt jury instruction, and raises the claim here for the first time. This Court has no jurisdiction to consider issues not raised in the courts below. Street v. New York, 394 U.S. 576 (1969).

B. This Court Should Deny Certiorari Because The Issue Is Not Worthy Of Certiorari Review.

The petitioner challenges the trial court's jury charge on the basis of Cage v. Louisiana. Because that decision was clarified in Victor v. Nebraska and Sandoval v. California, Nos. 92-8894 and 92-9049 (March 22, 1994), and because that decision distinguishes Cage in some ways, certiorari is not warranted to compare the jury instruction in this case to the instruction in Cage. Furthermore, the petitioner's claim involves nothing more than an application of existing law to the facts of this case. It does not involve important federal questions of a wide scope that are proper matters for certiorari review.

C. This Court Should Deny Certiorari Because The Claim Is Meritless.

The petitioner's claim, that the reasonable doubt jury instruction violated Cage v. Louisiana because it did not satisfy due process and it permitted her jury to convict on an insufficient burden of proof, is meritless.

The trial court in this case instructed the veniremembers at the outset of trial in accordance with the petitioner's request that they be told, among other things, that her guilt had to be proved "beyond a reasonable doubt and to a moral certainty." (R. 1200-1203, 107-112) Not surprisingly, the petitioner did not object when the trial court instructed the jury at the close of the evidence that it must find the petitioner innocent unless it was convinced beyond a reasonable doubt and to a moral certainty of her guilt.

Apart from the fact that the petitioner entered no objection to the reasonable doubt jury instruction, her belated claims of error in this Court are not well taken. The jury charge repeatedly informed the jurors that their decision as to guilt or innocence had to be based on the evidence, and not on suspicion, guess, or surmise. (R. 919-922) This Court made it clear in Victor and Sandoval that, even though a jury instruction contains terms such as "moral certainty" and "actual, substantial doubt," there is no error as long as the charge, taken as a whole, makes it clear

to the jury that it can not convict on a standard lower than that required by due process. The jury charge here made it clear that the proof required for conviction was to be based on the evidence and had to be proof beyond a reasonable doubt of every fact necessary to prove the crime charged.

No error occurred with regard to the jury instruction, so certiorari should be denied.

IV.

THIS CASE NEED NOT BE HELD FOR ANY REASON.

The petitioner requested that this case be held pending this Court's decisions in Victor v. Nebraska and Sandoval v. California. Apart from the fact that certiorari should have been denied because no issue was ever before raised regarding the reasonable doubt instruction, this case need not be held since Victor and Sandoval have been released.

CONCLUSION

Certiorari should be denied in this case.

Respectfully submitted,

JAMES H. EVANS
ATTORNEY GENERAL

Melissa G. Math

MELISSA G. MATH
DEPUTY ATTORNEY GENERAL

NO. 93-7659

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CERTIFICATE OF SERVICE FOR BRIEF IN OPPOSITION

I hereby certify that copies of the foregoing have been mailed, first class postage affixed, to counsel for petitioner:

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this 31st day of May, 1994.
All parties required to be served have been served.

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**REPLY TO STATE'S OPPOSITION
TO
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF ALABAMA**

Petitioner Louise Harris respectfully submits this short reply to the State of Alabama's *Brief in Opposition to Certiorari* which was filed in this Court last week. This response is necessitated by several misrepresentations in the state's brief.

The first and most serious of these is the State of Alabama's assertion that the issues raised in the petition for certiorari are not properly before this Court. The state alleges throughout its brief, see *Brief for the State in Opposition*, at i, ii, 1, 11, 12, 17-18, 22, that these issues were "not raised in the courts below" and that this Court therefore lacks jurisdiction. The record wholly refutes this contention.

As Mrs. Harris stated in her petition, both the issue of the

trial court's standardless override of the jury's life verdict and the flaws in the "reasonable doubt" instruction were raised and rejected on the merits by the appellate courts of Alabama. (See Attachment #1, "Brief Excerpts.") With regard to the override in particular, the Alabama Court of Criminal Appeals wrote:

> The appellant contends that the trial court's imposition of the death sentence, after the jury returned a verdict of life imprisonment without parole, violated her constitutional rights. . . . However, the constitutionality of Alabama's statutory sentencing scheme was approved by the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242, 252 (1976), and the jury verdict override provisions were specifically found constitutional in Spaziano v. Florida, 468 U.S. 447, 457-67 (1984).

Harris v. State, 632 So. 2d 503, 538 (Ala.Cr.App. 1992). (See Attachment #2) That court's analysis of the issue rested on federal constitutional law and continued on at some length. Id. at 538-39. The Alabama Supreme Court then affirmed this holding without comment. Ex parte Harris, 632 So. 2d 543, 544 (Ala. 1993). (See Attachment #3.) At no point did either court invoke or allude to any procedural bar to the resolution of this claim. Contrary to the state's misrepresentation, this claim is properly before this Court for review. Harris v. Reed, 489 U.S. 255 (1989).[1]

The state's disingenuous reliance on an imaginary procedural bar is disturbing. Respondent's assertions are particularly distasteful here because it is the State of Alabama, not

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[1]The reasonable doubt issue is similarly properly preserved. (See Attachment #1, "Brief Excerpts"; Attachment #2, Harris v. State, 632 So. 2d at 538.)

petitioner, who has flouted procedural rules in this case. Respondent sent its Opposition to this Court on May 31, 1994. Yet Mrs. Harris had filed and served her petition in a timely fashion on January 26, 1994, and the case was docketed by this Court on the same day. Rule 15.2 of the rules of this Court specifically allows a respondent only 30 days within which to reply to a petition for writ of certiorari. The State of Alabama, without cause or comment, missed its deadline by over three months. While invoking nonexistent procedural bars against petitioner to preclude review of important federal claims, respondent pays no heed whatsoever to the rules by which it is bound.

The state next seeks to prevent the granting of the writ by contending that there is no federal issue here. *Brief for the State in Opposition*, at 12, 18. Whether Alabama's capital override scheme--unique among the states and never before examined by this Court--comports with the Eighth Amendment is of course a federal constitutional question. Moreover, the Alabama courts rejected petitioner's challenge to the override with a misguided but unmistakable reliance on this Court's Eighth Amendment jurisprudence, in particular Proffitt v. Florida, 428 U.S. 242 (1976) and Spaziano v. Florida, 468 U.S. 447 (1984). Nor can respondent escape the constitutional implications of jury override merely by reciting the various elements of Alabama's statute: these are not in dispute. The question before this Court is whether a statute which allows inconsistent

application of the override and has no appellate mechanism for ensuring that its use is evenhanded provides the guided discretion required by precedent. This is an Eighth and Fourteenth Amendment inquiry. See, e.g., Parker v. Dugger, 498 U.S 308 (1991) (where this Court reversed a sentence of death due to the failure of the Florida courts to conduct appropriate appellate review in a case of jury override).

Third, the state's arguments on the merits are equally unavailing. The mitigating evidence presented by numerous prominent Montgomery County citizens on behalf of Louise Harris was unusually compelling and clearly carried great weight with the sentencing jury. Nor can respondent dismiss the most telling evidence of the override's infirmity, the unpredictable and variable use of override authority by Alabama's trial courts. *Brief for the State in Opposition*, at 10. This Court can examine the cases in which override was employed and observe that there is no principled way to determine why the jury life verdict was rejected and death imposed in one case but not in another.

Finally, the state would have this Court ignore the important questions raised by the Alabama "reasonable doubt" instruction that were not resolved in Victor v. Nebraska and Sandoval v. California, 511 U.S. ___, 127 L.Ed.2d 583, 114 S.Ct. ___ (1994). For example, while the holding in Victor rested on the conclusion that "substantial" doubt would not have been understood in that case to implicate its magnitude, there is no such security here. Indeed, the trial court, rather than

instructing the jurors in terms of the state's burden, told them that only an "actual and substantial doubt" would "justify an acquittal." (R.921)

Even more problematic in petitioner's case was the focus on "moral" as opposed to evidentiary certainty. That term was used as a synonym for reasonable doubt and was repeated for the jury *fifteen* times. Moreover, the term "moral" took on a special significance here because the state's case against petitioner was presented literally in "moral" terms. The state portrayed Louise Harris from beginning to end, in both phases of trial, as an immoral "Jezebel" who was carrying on an adulterous affair and sought her husband's death to be with her boyfriend. The prosecution actually told the jury that petitioner became guilty of conspiracy to murder when she embarked on that affair! (R.837-38) It went so far as to argue for a death sentence on the ground that petitioner "is not a good person." (R.1034) Its examinations of witnesses dwelt heavily on her relationships with men (R.442-43), and each of its arguments resounded the theme of her immorality. The state made morality the very cornerstone of its case.[2]

As Justice Kennedy has noted, there will be cases in which reliance on the term "moral certainty" proves far more troubling

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[2]This was especially troubling because petitioner was linked to the crime only through the alleged conspiracy with her lover. Mrs. Harris was charged not with pulling the trigger or even being present at her husband's murder but with having arranged it with her boyfriend. That boyfriend, in exchange for a deal through which he escaped the death penalty, presented the key testimony against her at trial.

than it did in Sandoval. Victor, 127 L.Ed.2d at 601. (Kennedy, J., concurring) In a case in which personal morality is made the key issue--and is in fact used as evidence of guilt--reliance on a "moral certainty" for the proof necessary for conviction is unacceptable.

This Court should grant certiorari to resolve these important constitutional issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached document has been served upon counsel for the State of Alabama, Melissa G. Math, Esq., Office of the Attorney General, Alabama State House, 11 South Union Street, Montgomery AL 36130 by placing same in the United States Mail, postage prepaid.

This the 8th day of June, 1994.

Ruth E. Friedman

"ATTACHMENT #1"

testimony would not suffice. Mills v. State, 498 So. 2d 187, 191-92 (Ala.Cr.App. 1987); McCoy v. State, 397 So. 2d 577, 587 (Ala.Cr.App. 1981). Moreover, the jury should have been told that such evidence must be substantive and not merely speculative. Steele v. State, 512 So. 2d 142, 144 (Ala.Cr.App. 1987). The jury charge in this instance was wholly deficient.

E. THE JURY INSTRUCTIONS WERE OTHERWISE IN VIOLATION OF APPPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS.

The jury instructions given Louise Harris' jury were unconstitutional in several other respects.

First, the instructions lessened the state's burden of proof. The court told the jury that the burden of proof shifts to the state when a defendant pleads not guilty, as if the state did not always bear the burden of establishing Louise Harris' guilt beyond a reasonable doubt. (R. 919) The jurors were then told that if they had "an abiding conviction of the truth of the charge" this would suffice for a guilty verdict (R. 921), although a reasonable doubt could coexist with such an "abiding conviction." They were next instructed on 15 different occasions that "moral certainty" would satisfy the reasonable doubt requirement (R. 917, 919, 921, 924, 925, 927, 932, 935, 936, 938, 940, 941, 946) and that any doubt had to be "substantial." (R. 921) These reasonable doubt charges were confusing and served to reduce the state's burden. See, e.g., Cage v. Louisiana, 112 L.Ed.2d 339 (1990).

Second, the court failed to charge adequately on bias and interest. The jurors were told that credibility could be attacked

XXIV. THE COURT'S IMPOSITION OF A DEATH SENTENCE AFTER THE JURY RETURNED A VERDICT OF LIFE IMPRISONMENT WITHOUT PAROLE VIOLATED PETITIONER'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND THE ALABAMA CONSTITUTION.

The jury that considered all the evidence in this case determined that life imprisonment without parole was the appropriate punishment for the crime for which Louise Harris was convicted. The trial court's summary dismissal of that determination and subsequent imposition of a death sentence deprived petitioner of basic constitutional guarantees.

A. REJECTION OF THE JURY'S VERDICT WAS NOT APPROPRIATE IN THIS CASE.

The jury returned a verdict of life in prison without possibility of parole for Mrs. Harris.[111] As acknowledged by the sentencing court, the mitigating evidence in this case was substantial. Evidence was presented that Mrs. Harris was a "hardworking and respected member of her community." She was "a steady worker in her church and community." The court found that she was highly regarded by her employees and friends. (R. 1254C) She never caused any problems or got into trouble. (R. 1254) Numerous witnesses took the stand at the trial to testify about her character.[112]

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111. The state also apparently viewed Mrs. Harris' case as proper for the life-without-parole option since it entered into plea negotiations with her during this trial. (R. 593, 755-56)

112. It was error for the trial court not to give these circumstances their proper mitigating effect. See, e.g., Dailey v. State, 594 So. 2d 254, 259 (Fla. 1991) (error for sentencing court, recognizing presence of numerous mitigating circumstance, to find none "of the factors presented by the Defendant to mitigate this crime"; new sentencing ordered).

Rarely will a court be faced with a capital defendant whose past is marked by unmitigated hard work, devotion to her children and her church, and the respect of the community. Here was a defendant who had worked several jobs to make ends meet (R. 733), was the caretaker for her own and her husband's children (R. 731-32) and was exceptionally well thought of by different groups in the Montgomery community. Seldom will prominent members of a community take the stand at a capital murder trial to attest to the good character of the accused.

In face of this evidence and this person and the jury verdict--and the fact that the man who arranged the plot to kill, Lorenzo McCarter, was being spared a death sentence for his testimony--the trial court found that the single aggravating factor of murder for pecuniary gain, purportedly established by the guilt verdict itself, justified an override. The court reached this determination after improper prodding by the prosecution[113] and the admission of improper evidence.[114] While the death penalty is meant to be applied only to a narrow class of those convicted of a capital offense, Zant v. Stephens, 462 U.S. 862 (1983), the trial court in this case ignored that mandate and basically sentenced petitioner to death for having been convicted of capital murder.[115] Rejection of the jury verdict was uncalled for here.

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113. The state's argument for death at the sentencing hearing was improper, contended without basis that the jurors did not follow the law (R.1035), and sought to obtain a sentence of death on the basis of petitioner's adultery (R.1037-38) and other improper considerations. (R.1038-39)

114. This included a presentence investigation report with unrebutted hearsay and the unconfronted statements of petitioner's codefendants. Both sets of documents were inadmissible. Gardner v. Florida, 430 U.S. 349 (1977); Bruton v. United States, 391 U.S. 123 (1968).

It is also unclear whether the court weighed the statutory as well as the *non*statutory mitigating evidence in its calculus, as required by statute. (R.1254D)

It further appears that the state may have written the court's order for it. United States v. El Paso Natural Gas Co., U.S. 651, 656 n.4 (1964).

B. THE ALABAMA CAPITAL STATUTE THAT ALLOWS JUDICIAL OVERRIDE OF A JURY VERDICT OF LIFE IMPRISONMENT IS UNCONSTITUTIONAL

Judge Thomas sentenced petitioner to death solely on the basis of § 13A-5-47, Code of Alabama (1975) which provides that a trial court is not bound by a jury's sentencing recommendation. Both on its face and as it was applied to the facts of this case, that capital sentencing provision does not pass constitutional muster.

1. Because the override provision allowed the trial court to reject the jury's life sentence determination without any standards to guide its discretion, § 13A-5-47 deprived petitioner of her Eighth and Fourteenth Amendment rights.

The abiding principle of Eighth Amendment law is that a death sentence cannot be imposed capriciously. Gregg v. Georgia, 428 U.S. 153 (1976). Regardless of whether or not the Eighth Amendment prohibits rejection of a jury's life verdict in every instance,[116]

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115. The court gave no other basis for rejecting the jury verdict. (R. 1254D)

116. Petitioner also challenges the ability of a trial judge to reject a determination by the"conscience of the community on the ultimate question of life or death." Witherspoon v. Illinois, 391 U.S. 510, 519 (1968). A death penalty scheme that denies the defendant the benefit of a jury decision deprives him of due process of law and the heightened reliability required by the Eighth Amendment. Woodson v. North Carolina, 428 U.S. 280 (1976).

the trial court's override in this case, without any standards to guide its discretion, was clearly in violation of the state and federal constitutions.

Of the thirty-seven states with death penalty laws, only seven allow a judge to reject a jury's sentencing determination. Of the seven, only three--Florida, Indiana, and Alabama--authorize a trial court to override a jury's life sentence. Of these three, only Alabama permits a trial judge to impose a death sentence without any guidelines for weighing and considering the jury's decision. Because judicial override statutes have been found to satisfy Eighth Amendment requirements only where adequate safeguards are present, a scheme that allows a judge to override on the basis of inadmissible evidence, inapplicable aggravating circumstances, and other improper reasons cannot pass constitutional muster.

2. Statutes permitting trial courts to impose death after a jury life vote are constitutional only if they contain adequate standards for guiding judges' discretion.

The United States Supreme Court has upheld the constitutionality of judicial override only where an exacting standard is present to circumscribe the court's decisionmaking. In affirming Florida's death penalty scheme, the Court held:

> Perhaps most importantly the Florida Supreme Court has held that the following standard must be used to review a trial court's rejection of a jury's recommendation of life. . . . "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."

Dobbert v. Florida, 432 U.S. 282, 295, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977) (quoting Tedder v. State, 322 So.2d 980, 910 (Fla. 1975)) (emphasis in Dobbert). See also Proffitt v. Florida, 428 U.S. 242, 249-51 (1976) (noting importance of Tedder standard in finding that Florida statute had addressed constitutional deficiencies).[117]

In considering this very issue, the Indiana Supreme Court wrote into law a similar standard. Vacating a trial court's imposition of a death sentence, the court concluded that "[i]n order to sentence a defendant to death after the jury has recommended against death, the facts justifying a death sentence should be so clear and convincing that virtually no reasonable person could disagree that death was appropriate." Chavez v. State, 534 N.E.2d 731 (Ind. 1989) (emphasis added). The court based its decision in large part on the significance of the jury role in Indiana death penalty proceedings,[118] id. at 5, and on the importance of limiting the sentencer's discretion. Id. at 6.

In the most recent opportunity it has had to comment on override schemes, the United States Supreme Court once again made known its approval of the Tedder standard:

> We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring

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117. The Florida Supreme Court takes its role in reviewing overrides very seriously. It has reversed where trial judges have overstepped their mandate, see, e.g., Richardson v. State, 437 So.2d 1091 (Fla. 1983); Cannaday v. State, 427 So.2d 723 (Fla. 1983), and has affirmed where the lower court decision has abided by the standard. See, e.g., Spaziano v. State, 433 So.2d 508 (Fla. 1983).

118. Juries have played no less a significant role in capital cases in this state. See Beck v. State, 396 So.2d 645, 659 (Ala. 1981); Ex Parte Williams, 556 So. 2d 744 (Ala. 1987).

> that the death penalty is not imposed arbitrarily or irrationally. We have specifically held that the Florida Supreme Court's system of independent review of death sentences minimizes the risk of constitutional error, and have noted the "crucial protection" afforded by such review in jury override cases.

Parker v. Dugger, 112 L.Ed.2d 812, 826 (1991) ("The Florida Supreme Court did not conduct an independent review here. In fact, there is a sense in which the court did not reivew Parker's sentence at all.") The Court has upheld death penalty statutes only where the discretion of the sentencer has been adequately limited by statutory safeguards. Gregg v. Georgia, 428 U.S. 153, 189 (1972). See also Dobbert v. Florida, 432 U.S. at 295-96 ("A jury recommendation of life may be overridden by a judge only under the exacting standards of Tedder)" (emphasis added). This Court should reexamine the use of judicial override in this state[119] consistent with both current norms[120] and the Constitution.[121]

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119. Increasing use of the override has also led to a proliferation of Alabama death sentences and consequently death penalty appeals: nearly a quarter of the approximately 125 people on Alabama's death row are there because of judicial rejection of jury life verdicts.

120. See Penry v. Lynaugh, 492 U.S. 302 (1989) (noting importance of current practices and state consensus in determining evolving standards of decency) .

121. In rejecting the Tedder standard as an "extra protection" afforded capital defendants, Murry v. State, 455 So.2d 53, 65 (Ala. Crim. App. 1983), Alabama courts have failed to recognize that a mechanism limiting discretion is integral to the constitutionality of the override. See Dobbert, 432 U.S. at 285 (terming Tedder standard a "crucial protection" in the Florida scheme); Spaziano v. Florida, 468 U.S. 447, 465 (1984) (recognizing Tedder standard as significant safeguard in Florida's sentencing process).

3. The trial court's rejection of the jury's recommendation was standardless and its determination that death was appropriate was not one with which "virtually no reasonable person could differ."

Judge Thomas's decision to discard the jury's verdict for life was not predicated on any statutory or constitutional standard. Nor can his action be said to have conformed to either the Tedder or Chavez guidelines.

The trial court's own sentencing order notes such mitigating evidence as that Mrs. Harris was a hard worker and enjoyed a good reputation in the community (R.1254) It also acknowledges that she was well respected by fellow church members, employers and friends and was needed by her family. (R.1254C) Yet the court found that "the one statutory aggravating circumstance found and considered [pecuniary gain] far outweighs all of the non-statutory mitigating circumstances" (R.1254D) No reason was given as to why aggravation outweighed mitigation or why the jury's determination on the same issue was incorrect.

In light of the compelling mitigating evidence--and the single factor in aggravation--it cannot be said that "no reasonable person could disagree that death was appropriate." Chavez v. State, 534 N.E.2d 731 (Ind. 1989). The trial court's standardless rejection of the jury verdict cannot stand.

XXV. PETITIONER'S DEATH SENTENCE CANNOT STAND BECAUSE IT IS DISPROPORTIONATE TO SENTENCES IMPOSED ON SIMILAR DEPENDANTS UNDER SIMILAR CIRCUMSTANCES.

Louise Harris was convicted of murder-for-hire in the death of her husband. The state's evidence showed that Lorenzo McCarter

"*ATTACHMENT #2*"

of § 12-18-10(e), Code 1975, and this opinion is hereby adopted as that of the court.

AFFIRMED.

All the Judges concur.

COASTAL POWER PRODUCTS, INC.

v.

Dolphus M. BISHOP.

AV92000454.

Court of Civil Appeals of Alabama.

Dec. 22, 1993.

Totally disabled workers' compensation claimant was determined to not be a proper candidate for vocational rehabilitation by Circuit Court, Jefferson County, Josh Mullins, J. Employer appealed. The Court of Civil Appeals, L. Charles Wright, Retired Appellate Judge, held that evidence of claimant's disability coupled with limited vocational experience supported determination that vocational rehabilitation was neither appropriate nor feasible.

Affirmed.

Workers' Compensation ⇐1634

Trial court's determination that totally disabled workers' compensation claimant was not proper candidate for vocational rehabilitation was supported by evidence that claimant was 47 years old, had always been employed as laborer, completed eighth grade education, had undergone diskectomy operations, had severe constant pain, walked with aid of crutches, and required assistance to dress. Code 1975, § 25-5-77.

John W. Clark, Jr. of Clark & Scott, P.C., Birmingham, for appellant.

David M. Cowan of Heninger, Burge & Vargo, Birmingham, for appellee.

L. CHARLES WRIGHT, Retired Appellate Judge.

This is a workmen's compensation case. The only issue presented on appeal is whether the totally disabled claimant is a proper candidate for rehabilitation, which is reasonably calculated to restore him to gainful employment and which is in his best interests. § 25-5-77(c), Ala.Code 1975.

The trial court entered findings of fact and conclusions of law. That the claimant has undergone two diskectomy operations on two different areas of his spine, that he continues to have severe constant pain, and that he walks with the aid of crutches and requires the aid of his wife to dress and undress are among the undisputed facts related in the findings of the court.

The employer insists that in spite of these facts and the fact that the claimant is 47 years of age, that he has always been employed as a laborer, and that he completed only the 8th grade, the claimant is reasonably capable of rehabilitation.

Section 25-5-77 provides, in pertinent part, the following:

"(c) If the employer so elects, the employee shall submit to and undergo vocational rehabilitation....

"(d) If an employee refuses, without the consent of the court, to accept vocational rehabilitation at the employer's request, the refusal shall result in loss of compensation for the period of refusal.

"(e) All disputes with regard to vocational rehabilitation may be submitted to the court for resolution."

The trial court determined as follows:

"This court, having considered all of the evidence and seeing what it has, is of the opinion that it would not be reasonably appropriate or feasible for the plaintiff to undergo vocational rehabilitation. Vocational rehabilitation would not restore the plaintiff to gainful employment as that term is defined in *Ex parte Beaver Valley Corp.*, 477 So.2d 408 (Ala.1985)."

The supreme court in *Ex parte Beaver Valley Corp.*[1] stated:

"First, the court must determine if the worker is a proper candidate for vocational rehabilitation....

"It is the trial judge, not the expert witnesses, who is to make these determinations. The testimony of expert witnesses is not binding on the trial court. Even if such testimony is uncontradicted, the weight and sufficiency to be attributed to it are for the trier of fact."

The trial court, as we have shown, made the determination that vocational rehabilitation was neither appropriate nor feasible for this employee under the evidence. After our examination of the record, this court finds such determination fully supported therein.

The judgment of the trial court is affirmed.

The foregoing opinion was prepared by Retired Appellate Judge L. CHARLES WRIGHT while serving on active duty status as a judge of this court under the provisions of § 12-18-10(e), Code 1975, and this opinion is hereby adopted as that of the court.

AFFIRMED.

All the Judges concur.

Louise HARRIS

v.

STATE.

3 Div. 332.

Court of Criminal Appeals of Alabama.

June 12, 1992.

Rehearing Denied Nov. 25, 1992.

Defendant was convicted in the Montgomery Circuit Court, H. Randall Thomas, J., of capital murder and was sentenced to death. On appeal, the Court of Criminal Appeals, McMillan, J., held that: (1) defendant's absence at certain pretrial hearings was not improper; (2) indictment was not duplicitous; (3) defendant was not entitled to change of venue; (4) photographs of victim were admissible; and (5) finding of aggravating circumstance, that murder was committed for pecuniary gain, was supported by evidence.

Affirmed.

Montiel, J., dissented and filed opinion.

Affirmed, Ala., 632 So.2d 543.

1. Criminal Law ⇐1028

Although failure to object during capital case does not preclude review of alleged error, such failure weighs against finding of error.

2. Constitutional Law ⇐268.1(5)

Criminal Law ⇐641.10(2)

Capital murder defendant was not deprived of due process when court granted counsel's request to be removed from case if they could not be paid salaries in excess of statutory limit. U.S.C.A. Const.Amends. 5, 14; Code 1975, § 15-12-21.

3. Criminal Law ⇐636(3)

Capital murder defendant's right to be present during every stage of trial was not violated when trial court conducted hearing in defendant's absence in which defense counsel was removed; defendant's presence at hearing would have been useless to her defense, and thus hearing was not "critical stage" of trial. U.S.C.A. Const.Amend. 6.

See publication Words and Phrases for other judicial constructions and definitions.

4. Jury ⇐33(5.1)

Fact that prosecutor used 11 of 19 peremptory strikes to remove black venire-

1. The author of this opinion, while Presiding Judge of this court, prior to his retirement and subsequent recall to active status, participated by dissent in the case of *Beaver Valley Corp.* v. *Priola*, 477 So.2d 404 (Ala.Civ.App.1984). The supreme court, in *Ex parte Beaver Valley Corp.*, subsequently upheld the views expressed in that dissent.

members was insufficient to make prima facie showing of discrimination, requiring race-neutral explanation by prosecutor, where black percentage of representation on ultimately seated jury was greater than its percentage of general population in county. U.S.C.A. Const.Amends. 6, 14.

5. Indictment and Information ⇐125(29)

Indictment charging capital murder for hire was not duplicitous, though it allowed finding of guilt if jury found that murder was committed either for pecuniary gain or pursuant to a contract or for hire; it could properly be alleged in single count that defendant committed offense by one or more specified means.

6. Criminal Law ⇐798

Instruction in capital murder case concerning jury unanimity was proper even though it did not require unanimity as to one of the alternative theories of capital offense, i.e., murder for hire, murder pursuant to contract, or murder for pecuniary gain; it was permissible for jurors to agree on unanimous verdict based on any combination of alternative means of committing single offense.

7. Criminal Law ⇐1166.14

Murder defendant was not prejudiced by her absence from pretrial conference during which state gave brief rendition of what it anticipated its case and evidence would entail, in that trial court had ordered state to turn over its entire file on case to defense.

8. Criminal Law ⇐636(3)

Holding of various pretrial conferences in murder defendant's absence was not error; matters discussed involved questions of law and not witness testimony, and it was clear that defendant's presence would not have aided her defense. U.S.C.A. Const.Amends. 6, 14.

9. Criminal Law ⇐1166.14

Although defense counsel could not waive murder defendant's right to be present at pretrial hearing, defendant was not prejudiced by her absence from hearing which involved only questions of law.

10. Criminal Law ⇐134(4)

Private investigator's informal survey of 25 to 30 people in county, revealing that 35 to 40% of people questioned had fixed opinion as to murder defendant's guilt, was insufficient to warrant change of venue.

11. Criminal Law ⇐126(2)

Murder defendant was not prejudiced from any pretrial publicity, for purpose of determining entitlement to change of venue, where no juror remaining on venire indicated that he or she could not decide case based on facts presented and on law instructed by court.

12. Jury ⇐131(13)

Whether capital defendant is allowed individual voir dire of every prospective juror is matter vested within discretion of trial court.

13. Jury ⇐131(13)

Trial court did not abuse its discretion in denying capital murder defendant's request to have jury venire complete questionaire.

14. Criminal Law ⇐1035(6)

Trial court's unobjected-to failure to ask potential jurors whether any of them had fixed opinions in favor of death sentence was not plain error; in any event there was no prejudice in that jury did not recommend death penalty.

15. Criminal Law ⇐850

Trial court did not err in allowing sheriff's deputies to manage and be in charge of jurors during their sequestration and deliberations, even though victim of crime was deputy sheriff, absent evidence of any improper behavior by deputies or of any improper communications between deputies and jury.

16. Jury ⇐99(1)

Mere knowledge of facts and issues in case does not disqualify potential juror from serving on case.

17. Jury ⇐90, 103(6)

Trial court did not abuse its discretion in refusing to excuse for cause potential juror who knew murder victim personally and professionally and who was also familiar with

facts and circumstances of case; potential juror stated that he would base his decision on evidence presented at trial and on judge's instructions as to law.

18. Witnesses ⇐345(8)

Whether witness was placed on probation arising out of conviction in one county did not indicate possible bias in testifying for state in case arising out of second county, and thus cross-examination with regard to existence of such probation was not admissible for impeachment purposes.

19. Criminal Law ⇐427(3)

Coconspirator statements are admissible regardless of whether prima facie showing of existence of conspiracy is made prior to admission of statements.

20. Criminal Law ⇐427(5)

State made prima facie showing of murder conspiracy, justifying admission of coconspirator hearsay statements; witness testified that he had participated in telephone conversation with defendant and defendant's boyfriend in which he was asked to participate in murder of defendant's husband.

21. Criminal Law ⇐338(7), 633(1)

Presence of victim's sister at table for prosecution, and admission of victim impact evidence at trial, did not constitute error in capital murder prosecution.

22. Criminal Law ⇐723(1)

Prosecutor's emphasis on murder victim's role as deputy sheriff did not improperly prejudice defendant's case.

23. Criminal Law ⇐412.2(2, 3)

Statements made by murder victim's wife, when officers came to her home to inform her of husband's death and to investigate any leads she might be able to provide, were not made during custodial interrogation, and thus were admissible in subsequent prosecution of wife, even though no *Miranda* warnings had been given; at time statements were made, officers had no reason to suspect that wife was in any way connected with husband's death. U.S.C.A. Const.Amends. 5, 6, 14.

24. Criminal Law ⇐1170½(5)

Any error in limiting murder defendant's cross-examination regarding unrelated charges and convictions against prosecution witness was harmless, even if prosecutor "opened the door" to such questions and even in light of witness' role as one of two main nonaccomplice witnesses against defendant; witness admitted that he had been in trouble with law and that he had criminal record, and prosecution's overall case against defendant was strong.

25. Homicide ⇐166(7)

Evidence that defendant, a married woman charged with murdering her husband was having affair with codefendant was admissible; though defendant may have been prejudiced by evidence of bad character, defendant's relationship with codefendant was cornerstone of alleged conspiracy and established motive for murder.

26. Criminal Law ⇐438(6)

Photographs of murder victim, who died from shotgun wound to the face, were admissible as corroborating state's evidence, illustrating witnesses' testimony, proving victim's identity, showing nature and extent of his wounds, depiction of condition of scene where body was found, and depiction of condition and existence of certain items of evidence, as well as their location.

27. Criminal Law ⇐438(2)

Photograph of murder victim while he was still alive was admissible as tending to identify victim, especially in light of condition of victim's face after having been shot.

28. Homicide ⇐358(1)

Admission of photograph of victim when he was still alive during sentencing phase of murder prosecution was not error; it was not necessary that sentencing decision be made in context in which victim was mere abstraction.

29. Criminal Law ⇐726

Prosecutor's closing argument reference to fact that murder defendant had access to all of state's evidence was proper reply in kind to defendant's argument that she had

very limited resources relative to those of state.

30. Criminal Law ⇐720(5)

Prosecutor's closing argument comment, that two of state's witnesses gave testimony that "matched," was proper inference from evidence; witnesses' testimony was not contradictory in any significant regard.

31. Criminal Law ⇐720(5), 726

Prosecutor's closing argument comment, that two state witnesses had no reason to lie, was proper inference from record and also proper reply in kind to defense counsel's previous argument that both witnesses were biased and had motive for testifying for state.

32. Criminal Law ⇐720(5)

Prosecutor's closing argument explanation of agreement made by state to obtain murder accomplice's testimony could properly refer to fact that two other accomplices had invoked their Fifth Amendment right to remain silent; both witnesses had taken the stand and refused to testify in front of jury, and circumstances did not indicate that such refusal to testify was ever to protect defendant. U.S.C.A. Const.Amends. 5, 14.

33. Criminal Law ⇐720(9)

Prosecutor's closing argument comment, that defendant charged with murdering husband had moved out of her mother-in-law's house so that she could have privacy in which to carry on extramarital affair, was reasonable inference from evidence.

34. Criminal Law ⇐720(9)

Prosecutor's closing argument comment that defendant charged with murdering her husband had possibly been drinking or was otherwise intoxicated when she was called concerning husband's whereabouts on night of his murder was proper inference from evidence; there was testimony that defendant's speech was slurred and sluggish during telephone call in question.

35. Criminal Law ⇐726

Prosecutor's closing argument comment, that murder defendant was "begging * * * to frame" third party, was proper reply in kind to defense counsel's argument that third party was, in fact, accomplice and should have been charged in present case.

36. Criminal Law ⇐720(9), 726

Prosecutor's closing argument comment that murder defendant wanted husband killed by Friday because of impending car loan was proper inference from evidence and proper reply to defense argument that defendant would have benefitted had car loan gone through.

37. Criminal Law ⇐720(5)

Prosecutor's closing argument statement that witness did not change his testimony concerning his voice identification of murder defendant was proper argument; although witness initially testified otherwise, he subsequently stated that he had misunderstood trial court's question.

38. Criminal Law ⇐713

Prosecutor, in closing argument of capital murder case, was entitled to request that jurors not consider lesser-included offense of murder.

39. Homicide ⇐357(9)

Aggravating circumstance, that capital offense was committed for pecuniary gain, was established by jury's verdict of guilt on capital count, which had charged murder for hire.

40. Criminal Law ⇐720(5), 723(1)

Prosecutor could properly argue at capital sentencing hearing that trial court should not consider testimony of defendant's character witnesses because none of them knew of her extramarital affair with accomplice; inference that defendant should be sentenced to death because she was not good person was legitimate argument based on evidence that she hired people to murder her husband for money and to legitimize her extramarital affair.

41. Criminal Law ⇐723(1)

Prosecutor could properly argue in capital sentencing hearing that trial court not consider credibility of certain state's witnesses as nonstatutory mitigating factor, on ground that jury had already considered that evidence and arrived at verdict of guilt.

42. Criminal Law ⇐723(1)

Prosecutor at capital sentencing hearing could properly urge court to override jury's recommended life sentence on ground it was based on emotion rather than on evidence. Code 1975, § 13A-5-47(e).

43. Criminal Law ⇐723(1)

Prosecutor could properly argue at capital sentencing hearing that defendant should be sentenced to death because she had not been "battered" by victim, her husband, and thus fact that she had been abused by victim could not be considered as nonstatutory mitigating circumstance; argument was made in context of prosecutor's assertion that defendant's motive was strictly money or legitimization of extramarital affair, rather than because she had been abused by victim.

44. Criminal Law ⇐723(1)

Prosecutor's capital sentencing hearing comment on defendant's lack of remorse was proper inference from evidence.

45. Criminal Law ⇐1037.1(2)

Prosecutor's sentencing hearing reference to death of defendant's father, in prosecution for capital murder of defendant's husband, was not plain error, even if defendant was prejudiced by reference to fact that her father and husband had died in the same manner.

46. Criminal Law ⇐511.1(7)

Accomplice testimony in murder prosecution was sufficiently corroborated by testimony of nonaccomplice who was present with majority of coconspirators during commission of offense, and by testimony of another nonaccomplice, who had been asked to, but had refused to join conspiracy. Code 1975, § 12-21-222.

47. Homicide ⇐357(9)

Finding that capital murder was committed for pecuniary gain was supported by evidence that defendant paid accomplices to kill husband by certain date in order to prevent him from spending insurance money.

48. Criminal Law ⇐808½

Capital murder instruction, which substantially tracked statutory language describing murder for pecuniary gain, was sufficient, even though court did not give requested instruction that defendant was required to know about her husband's insurance and retirement benefits before she could be convicted of murdering him for pecuniary gain. Code 1975, § 13A-5-40(a)(7).

49. Homicide ⇐308(5)

Capital murder defendant was not entitled to instruction on lesser included offense of reckless murder where evidence would not have supported such charge; evidence showed that murder was committed after laying in wait for and ambushing victim.

50. Criminal Law ⇐986.4(1, 3), 986.5

Presentence reports are admissible evidence, which may be considered by trial court in sentencing defendant to death, provided information contained therein is relevant to sentencing and defendant has had opportunity to rebut evidence.

51. Criminal Law ⇐1208.1(6)

Statements made by codefendants are admissible in capital sentencing hearing where they are relevant to sentencing and have probative value.

52. Criminal Law ⇐1137(2)

Invited error rule is applied equally in both capital cases and noncapital cases.

53. Homicide ⇐358(1)

Hearsay evidence, such as codefendants' statements, may be introduced and considered during sentencing stage of capital murder trial.

54. Criminal Law ⇐1137(2)

Murder defendant who sought to introduce codefendants' statements in sentencing phase of capital trial in order to rebut claim in presentence investigation report that accomplices had identified her as participating in murder, could not complain on appeal that sentencing court had considered statements; any error was invited.

55. Homicide ⇐357(9)

Finding that murder was committed for pecuniary gain, as aggravating circumstance warranting death sentence, was supported by evidence that defendant paid accomplices to

kill her husband and that defendant was aware of and sought insurance money and other benefits payable upon husband's death. Code 1975, § 13A-5-51(7).

36. Criminal Law ⇐983

Death sentence imposed upon wife who paid to have husband killed was not disproportionate to that of accomplices, considering their respective roles in offense.

Ruth E. Friedman, Atlanta, GA, and Bryan A. Stevenson, Montgomery, for appellant.

James H. Evans, Atty. Gen., and Robert Lusk and Sandra Stewart, Asst. Attys. Gen., for appellee.

McMILLAN, Judge.

The appellant was indicted for two counts of capital murder in the murder of Isaiah Harris: murder for pecuniary gain or pursuant to a contract for hire and murder of a deputy sheriff while the deputy was on duty. Following the introduction of the State's evidence, the appellant moved that the second count of the indictment be dropped, because, she argues, the State failed to prove that Harris was on duty at the time of the offense. The trial court granted this motion, and the case went to the jury only on the first count of the indictment. The jury found the appellant guilty as charged in the first count of the indictment and recommended that she be sentenced to life imprisonment without the possibility of parole, seven jurors voting for life without parole and five voting for death by electrocution. Thereafter, a sentencing hearing was held before the trial court, after which the court ordered that the appellant be sentenced to death by electrocution.

The record indicates that the appellant was involved in an affair with Lorenzo McCarter, a codefendant, while she was married to Harris. The appellant and Harris had experienced marital problems in the past, which the victim apparently believed he had solved when he promised to buy the appellant a house. The record indicates that the appellant asked McCarter to hire someone to kill her husband. McCarter approached a co-employee about doing "the job"; however, the co-employee refused and told his supervisor about the solicitation. McCarter then approached Michael Sockwell and Alex Hood, other codefendants, to commit the offense. McCarter knew that Sockwell owned a gun. Prior to the offense, the appellant met with the three men and was shown the gun. Sockwell and Hood were paid $100 in advance to commit the offense, with the promise that more money would be paid upon completion of the murder. The State presented evidence of the existence of various insurance policies on the victim's life, with the appellant specified as the beneficiary.

The victim, who worked the night shift as a jailer, left his home at approximately 11:00 p.m. to go to work, after being awakened by the appellant a little later than usual. Immediately after Harris left home, the appellant paged McCarter on his beeper, giving the message that her husband was leaving. There was evidence that the appellant had paged McCarter on his beeper many times in the past to arrange liaisons. When he received the message in the instant case, McCarter was seated in Hood's car, located across the street from the entrance to the subdivision in which Harris and appellant lived. Also present in the car were Alex Hood and Freddie Patterson. Patterson was unaware of the conspiracy. Sockwell was hidden behind the hedge located at the entrance to the subdivision. Harris was driving to work in his own 1979 black Ford Thunderbird automobile. When Harris stopped at the stop sign at the entrance of the subdivision, Sockwell shot him once in the face at close range with a shotgun. As a result, the lower half of the victim's face was blown off, leaving his teeth, tongue, and "matter" from his face blown across the car. After the shot, the victim's vehicle traveled slowly across the highway and came to a stop in a ditch.

When the victim failed to arrive at work by 11:25 p.m., a co-employee telephoned his home twice and spoke with the appellant. There was testimony that the appellant offered no assistance and that her speech was slow or sluggish. Two men, returning from

work, discovered the victim's body shortly after midnight and telephoned the Montgomery Police Department. After the police arrived at the scene and identified the victim, several officers of the police department and employees of the Montgomery County Sheriff's Department went to the house of the victim and the appellant to notify the appellant of the victim's death. There was testimony that, upon being notified of the victim's death, the appellant began screaming and sobbing, but she shed no tears. Moreover, she became completely calm instantly in order to answer questions. A member of the Montgomery County Sheriff's Department, who knew both the appellant and the victim, testified that she asked the appellant why she did not appear to be upset, and that the appellant responded that she and the victim had been experiencing marital problems for some time. She also told the witness that she had engaged in several extramarital affairs, the current one being with Lorenzo McCarter. The appellant stated that she was in love with McCarter. In response to questions asked by an investigator with the sheriff's department, she responded that McCarter's car was broken down in the vicinity, and when asked if McCarter could have killed the victim, the appellant responded, "If he did kill him I didn't tell him to." At trial, McCarter elected to testify against the appellant, in exchange for the prosecutor's promise not to seek the death penalty in his case.

I

[1] The appellant argues that the trial court erred in removing her appointed attorneys from the case when they sought "reasonable compensation" for representing her as a capital defendant. She further alleges error in the fact that she was not present at the hearing at which they were dismissed. A hearing was held on counsel's motion, during which appointed counsel requested that they receive $90 per hour or that they be excused. Although these appointed attorneys indicated that they preferred not to be excused from the appellant's case, the trial judge stated that because he was without authority to authorize higher compensation, he would relieve the attorneys of their appointment. The attorneys did not object. This matter was never raised again, either by the attorneys or by the appellant at any time prior to this appeal. See *Fisher v. State*, 587 So.2d 1027 (Ala.Cr.App.), cert. denied, 587 So.2d 1039 (Ala.1991), cert. denied, — U.S. —, 112 S.Ct. 1486, 117 L.Ed.2d 628 (1992) ("The appellant refers to § 15-1221(d), *Code of Alabama* 1975, which states that compensation for appointed counsel's trial preparation is limited to $1,000, at a rate of $20 an hour. The record contains no request by appellant or his counsel for additional fees, nor were any claims made concerning the constitutionality of this statute. Therefore, this matter is waived on appeal.") Although the failure to object during a capital case does not preclude review of the alleged error, such failure weighs against a finding of error. *Kuenzel v. State*, 577 So.2d 474, 523 (Ala.Cr.App.1990), affirmed, 577 So.2d 531 (Ala.1991), cert. denied, — U.S. —, 112 S.Ct. 242, 116 L.Ed.2d 197 (1991).

According to § 15-12-21, *Code of Alabama* 1975:

"(a) If it appears to the trial court that such defendant is entitled to counsel, that such defendant does not expressly waive the right to assistance of counsel and that such defendant is not able financially or otherwise to obtain the assistance of counsel, the court shall appoint counsel to represent and assist the defendant; and it shall be the duty of such appointed counsel, as an officer of the court and as member of the bar, to represent and assist said defendant.

". . . .

"(d) Counsel appointed in cases described in subsections (a), (b), and (c) above . . . shall be entitled to receive for their services a fee to be approved by the trial court. The amount of such fee shall be based on the number of hours spent by the attorney in working on such case and shall be computed at a rate of $40.00 per hour for time expended in court and $20.00 per hour for time reasonably expended out of court in the preparation of such case. The total fees to any one attorney in any case, from the time of appointment through the trial of the case, including motions for new trial, shall not, however,

exceed $1,000.00, except as follows: In cases where the original case involves a capital offense or a charge which carries a possible sentence of life without parole, the limit shall be $1,000.00 for out-of-court work, plus payment for all in-court work, said work to be billed at the aforementioned rates. Counsel shall also be entitled to be reimbursed for any expenses reasonably incurred in such defense to be approved in advance by the trial court. Retrials of a case shall be considered a new case."

[2] In *Ex parte Grayson*, 479 So.2d 76, 79–80 (Ala.1985), cert. denied, 474 U.S. 865, 106 S.Ct. 189, 88 L.Ed.2d 157 (1985), the appellant argued that Alabama's system of compensation for appointed counsel denied him of his rights to due process and equal protection of the laws, because of its application to capital cases. Apart from his equal protection argument, the appellant argued "that a capital defendant can not have effective assistance of counsel and, therefore, is deprived of liberty without due process, with such a limit on the amount to be paid to counsel." *Id.* at 79. The Alabama Supreme Court held adversely to the appellant on both issues, stating:

"These contentions are made on the premise that lawyers will not provide effective assistance unless paid a certain amount of money. But the legal profession requires its members to give their best efforts in advancing the "undivided interest of [their] client[s]."' *Polk County v. Dodson*, 454 U.S. 312, 318–19, 102 S.Ct. 445, 449–50, 70 L.Ed.2d 509 (1981). This Court, in *Sparks v. Parker*, 368 So.2d 528, 530 (Ala. 1979), quoted the New Jersey Supreme Court as follows:

"'We know of no data to support a claim that an assigned attorney fails or shirks in the least the full measure of an attorney's obligations to a client. Our own experience, both at the bar and on the bench, runs the other way. A lawyer needs no motivation beyond his *sense of duty* and his *pride*. [*State v. Rush*, 46 N.J. 399, 405–07, 217 A.2d 441, 444–45 (1966).]'

"We reaffirm this belief that attorneys appointed to defend capital clients will serve them well, as directed by their consciences and the ethical rules enforced by the state bar association. The counsel compensation statute, § 15–12–21, then, does not deprive petitioner of due process and equal protection of the laws."

Ex parte Grayson, supra, at 79–80 (emphasis added in *Grayson*). Thus, the Alabama Supreme Court has determined that the compensation statute does not deprive a defendant of his right to due process, and because this court is bound by the decisions of the Alabama Supreme Court, see *Scott v. State*, 570 So.2d 813, 816 (Ala.Cr.App.1990), we find no constitutional error in the trial court's granting of the appellant's attorneys' request to be removed from the case if they could not be paid salaries in excess of the statutory limit.

The appellant also argues that it was error for the trial court to conduct the hearing in which the appellant's original trial counsel were removed in her absence. The appellant argues that, as a defendant, she was entitled to be present during every stage, including every pretrial matter, of her trial. In *Johnson v. State*, 335 So.2d 663, 671–72 (Ala.Cr. App.), cert. denied, 335 So.2d 678 (Ala.1976), cert. denied, 429 U.S. 1026, 97 S.Ct. 649, 50 L.Ed.2d 629 (1976), the defendant argued that the trial court erred in overruling his motion to be present at the hearing of his preliminary pretrial motions. This court held:

"Preliminary motions hearings and pretrial motions hearings are not viewed by this Court as a 'critical stage' of the trial. *Berness v. State*, 263 Ala. 641, 83 So.2d 613. 23 C.J.S. § 974 states in pertinent part:

"'The trial does not embrace every procedural and administrative step and judicial examination of every issue of fact and law during the trial, and accused's presence is not necessary during proceedings which are no part of the trial, such as preliminary or formal proceedings or motions which do not affect his guilt or innocence....

"'It has been held that accused's presence is not necessary at the hearing and determination of a demurrer to the indictment or information, of a motion to quash the same, of a plea in abatement, or of a motion for leave to file an information, or to summon witnesses, or to amend the information ... or of other motions....

"'... Thus, the exclusion of accused during conferences of court and counsel on questions of law, at the bench or in chambers, has been considered not to constitute a denial of the right of accused to be present at every stage of the trial....' (Footnotes omitted.)

"Also see: *State v. Neal*, 350 Mo. 1002, 169 S.W.2d 686; *Rosebud County v. Flinn*, 109 Mont. 537, 98 P.2d 330."

See also *Maund v. State*, 361 So.2d 1144 (Ala.Cr.App.1978) (wherein this court rejected the defendant's argument that it was error for a pretrial hearing on a motion to disclose the State's evidence to have been held in defendant's absence, holding that pretrial hearings are not a "critical stage" of a trial at which a defendant has a right to be present).

Similarly, federal cases have construed Rule 43 of the Federal Rules of Criminal Procedure, which provides that a defendant must be present at every stage of his trial, to be inapplicable where the "privilege" of presence would be of no real benefit to the defendant. See *Peterson v. United States*, 411 F.2d 1074 (8th Cir.1969), cert. denied, 396 U.S. 920, 90 S.Ct. 247, 24 L.Ed.2d 199 (1970). See also *Stein v. United States*, 313 F.2d 518 (9th Cir.1962), cert. denied, 373 U.S. 918, 83 S.Ct. 1307, 10 L.Ed.2d 417 (1963) (the presence of a defendant, to be required, must bear a reasonable substantial relation to the opportunity to defend, because the constitution does not assure the privilege of presence when presence would be useless).

The question remains whether a distinction should be made when the case is a capital case. In *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir.1982), cert. denied, 464 U.S. 1002, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983), the court applied a stricter no-waiver rule to the right of presence for a capital defendant, the rule for a noncapital defendant, in federal court, being the "knowing-and-voluntary-consent requirement" to waiver. However, in determining a capital, as opposed to noncapital, defendant's rights pertaining to waiver of presence, the court began with the same analysis used in *Johnson v. State*, supra, that the hearing must be a critical or a central part of the trial. The court reasoned:

"A defendant's right to be present at all stages of a criminal trial derives from the confrontation clause of the Sixth Amendment and the due process clause of the Fourteenth Amendment. *Illinois v. Allen*, 397 U.S. 337, 338, 90 S.Ct. 1057, 1058, 25 L.Ed.2d 353 (1970); *Hopt v. Utah*, 110 U.S. 574, 579, 4 S.Ct. 202, 204, 28 L.Ed. 262 (1884). This right extends to all hearings that are an essential part of the trial—i.e., to all proceedings at which the defendant's presence 'has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.' *Snyder v. Massachusetts*, 291 U.S. 97, 105–06, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934). Compare *Hopt v. Utah*, supra (defendant has right to be present at empaneling of jurors); *Bartone v. United States*, 375 U.S. 52, 84 S.Ct. 21, 11 L.Ed.2d 11 (1963) (court cannot impose sentence in absence of defendant); *with United States v. Howell*, 514 F.2d 710 (5th Cir.1975); *cert. denied*, 429 U.S. 838, 97 S.Ct. 109, 50 L.Ed.2d 105 (1976) (no right to be present at *in camera* conference concerning attempted bribe of juror); *United States v. Gradsky*, 434 F.2d 880 (5th Cir.1970), *cert. denied*, 409 U.S. 894, 93 S.Ct. 203, 34 L.Ed.2d 151 (1971) [1972] (right to presence does not extend to evidentiary hearing on suppression motion.) We have already held that the penalty phase is an integral part of a capital trial for purposes of cross-examination. *See* text *supra* at 35–41. For similar reasons, we conclude that the capital defendant's interest in attending his sentencing hearing is as great as his interest in being present at the guilt determining stage. *Cf. Gardner v. Florida*, 430 U.S. [349] at 358, 97 S.Ct. [1197] at 1204 [51 L.Ed.2d 393] (sentencing is 'critical stage' of capital trial). Hence we hold that the right to be present extends to the sentencing as well as the guilt portion of a capital trial."

Id. at 1256–57. But see *Adams v. State*, 28 Fla. 511, 10 So. 106 (1891).[1]

The court in *Proffitt v. Wainwright*, supra, acknowledged in a footnote that in *Snyder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934), "which was a capital case, [the Court] stated that the sixth amendment privilege of confrontation could 'be lost by consent or at times even by misconduct.' *Snyder v. Massachusetts*, 291 U.S. at 106, 54 S.Ct. at 332." *Proffitt v. Wainwright*, supra, at 1257, n. 43. See also *State v. Davis*, 290 N.C. 511, 227 S.E.2d 97, 110 (1976) ("[t]he strict rule that an accused cannot waive his right to be present at every stage of his *trial* upon an indictment charging a capital felony, *State v. Moore*, 275 N.C. 198, 166 S.E.2d 652 (1969), is not extended to require his presence at the hearing of a pretrial motion for discovery when he is represented by counsel who consented to his absence, and when no prejudice resulted from his absence"). See also *State v. Piland*, 58 N.C.App. 95, 293 S.E.2d 278 (1982), appeal dismissed, 306 N.C. 562, 294 S.E.2d 374 (1982) ("[t]he [capital] defendant in this case has not demonstrated any prejudice to him by his absence from a part of the hearing. The evidence elicited was not disputed and there has been no showing that it would have been different had the defendant been present").

[3] Thus, if the appellant's presence, in the present case, would have been useless to her defense and if the hearing was not considered to be a "critical stage" of her trial, then we can find no error in the appellant's absence from the hearing. In *Lowery v. Cardwell*, 535 F.2d 546 (9th Cir.1976), the court held the record before it to be insufficient to determine whether the doctrine of fundamental fairness required the defendant's presence at an in-chambers conference during which the defense counsel sought to withdraw from the case. This conference occurred during trial and was based on the defense counsel's belief that the defendant had lied on the witness stand. The court remanded the case for a hearing to determine the defense counsel's reasons for his motion to withdraw and the details of what had occurred during this conference. On remand, the court disclosed the defense counsel's reasons for seeking to withdraw and stated that the only other matter discussed during the hearing concerned the length of the trial. No error was found in the trial court's action in conducting the hearing outside the defendant's presence. *Lowery v. Cardwell*, 575 F.2d 727 (9th Cir. 1978). Similarly, in the present case, the trial court's decision to allow the appellant's trial counsel to be removed from the case was based on a question of law, the dictates of a statute, a matter concerning which the appellant's presence would be useless. As noted in *Proffitt v. Wainwright*, supra, a defendant's right to be present arises from his right to confrontation and, in the present case, no witnesses were involved in this hearing. The appellant has been unable to suggest or demonstrate any possibility of prejudice resulting from her absence. Therefore, we find no error in this matter.

II

[4] The appellant argues that her conviction is due to be reversed because, she argues, the prosecutor used her peremptory strikes in a racially discriminatory manner and then refused to give reasons for those strikes. The record indicates that, in making his objection pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), defense counsel alleged that there were 17 black veniremembers on a panel of 51, and that the prosecutor used 11 of her 19 strikes to remove blacks. The prosecutor responded that the appellant had failed to make a prima facie showing pursuant to *Batson v. Kentucky*, supra. She stated that in Montgomery County, the black population constituted approximately 40% of the general population. She noted that of the 14 jurors, which included the 2 alternates, 8 were white and 6 were black. Of the two alternates, one was white and one was black. She concluded that, of the original 12 jury members, 7 would be white and 5 black, which would make the black percentage of representation on the jury over 40%. Defense counsel responded, stating that, because the prosecutor used 11 of her 19 strikes against blacks, she should have to show some reason for doing so. The trial court denied the appellant's motion.

In a companion case, which was tried by the same prosecutor in the same county, this court addressed this same claim under a basically identical factual situation. In *Hood v. State*, 598 So.2d 1022 (Ala.Cr.App.1991), the trial court found that the defendant failed to make a prima facie showing under *Batson* that the State had used its peremptory challenges in a discriminatory manner. In that case, the jury venire consisted of 44 veniremembers, 15 of whom were black. The prosecutor exercised 10 of her 16 peremptory challenges against black veniremembers, resulting in a jury composed of 5 blacks and 7 whites. In that case, as in the present case, the defendant "relied only on the number of blacks struck by the State. Defense counsel did not bring to the circuit court's attention any other factor which might tend to show that the prosecutor purposefully discriminated against potential jurors on the basis of race." In *Hood v. State*, this court relied on the following language in *Harrell v. State*, 571 So.2d 1270 (Ala.1990), cert. denied, 499 U.S. 984, 111 S.Ct. 1641, 113 L.Ed.2d 736 (1991):

> "[A] defendant cannot prove a prima facie case of purposeful discrimination solely from the fact that the prosecutor struck one or more blacks from the jury. A defendant must offer some evidence in addition to the striking of blacks that would raise an inference of discrimination. When the evidence shows only that blacks were struck and that a greater percentage of blacks sat on the jury than sat on the lawfully established venire, an inference of discrimination has not been created. Logically, if statistical evidence may be used to establish a prima facie case of discrimination, by showing a discriminatory impact, then it should also be available to show the absence of a discriminatory purpose."

Id. at 1271–72. This court, in *Hood v. State*, supra, stated:

> "Although both this court and the Alabama Supreme Court have observed that the assistant district attorney who prosecuted the appellant has a history of using peremptory challenges to discriminate against black jurors, see *Ex parte Bird & Warner*, [Ms. 89–1061 and 89–1062, December 6, 1991] [594] So.2d [676] (Ala. 1991), that history, standing alone, does not establish a prima facie case for the defense in any given case. Compare *Ex parte Harrell*, 571 So.2d at 1272 (past conduct of the prosecutor, in connection with other facts relating to the particular venire, is relevant in determining whether an inference of discrimination exists); *Ex parte Bird & Warner*, [594] So.2d at [681–82] ('evidence [of past history], in conjunction with the disparate impact of the peremptory strikes in this case, ... raises an inference of discriminatory intent'). In this case, the prosecutor did not state any reason for striking any member of the venire. Under these circumstances, *Harrell* dictates that we uphold the trial court's determination that the appellant did not establish a prima facie case under *Batson* and *Ex parte Branch*, 526 So.2d 609 (Ala.1987), for the following reasons: (1) the trial court was presented with no evidence of alleged discrimination other than the number of blacks struck by the State, and (2) the peremptory striking process did not have a disparate impact upon the number of blacks empaneled as jurors. Instead, the process resulted in a jury of proportionately more black citizens than the venire from which it was selected."

Because the same relevant facts and law apply to the present case, as those pertinent to this court's holding in *Hood v. State*, supra, we find that the trial court properly held that the appellant failed to make a prima facie showing of purposeful discrimination in the prosecutor's use of peremptory challenges against blacks.

1. In *Adams v. State*, supra, the court held that the judge committed reversible error by removing the defendant in a murder trial from the courtroom during a discussion between trial judge and counsel, in the jury's absence, regarding a witness's competency. The court held that a defendant has the right to be present, and must be present, during the trial of a capital case; thus no action by the trial court may occur in a defendant's absence, because his right to be present extends to discussions of questions of law as well as questions of fact. The court held that the trial judge's offer to repeat the argument in the defendant's presence could not possibly have restored the accused to the position of hearing what had been said in his absence.

III

The appellant argues that she was charged under a duplicitous indictment and that the trial court erred in failing to give the jury a unanimity instruction. Specifically, the appellant argues that the jury was improperly charged that all 12 had to agree that the appellant committed murder "either for pecuniary gain *or* pursuant to a contract or for hire in order to find her guilty of capital murder." The appellant acknowledges that such an instruction tracks the language of the indictment, but she argues that this instruction, and the indictment on which it was based, allowed her to be convicted of capital murder by a nonunanimous jury. She argues that "some of the jurors [might have] believed she had hired one or more men to kill her husband, while" others might have believed she had committed the murder for reasons of pecuniary gain, thus allegedly resulting in a non-unanimous verdict.

The record indicates that the count of the indictment that went to the jury charged that the defendant did "intentionally cause the death of Isaiah Harris by shooting him with a shotgun for pecuniary or other valuable consideration or pursuant to a contract or for hire in violation of Section 13A-5-40 of the Code of Alabama 1975 as amended." Pursuant to Section 13A-5-40(a)(7), *Code of Alabama* 1975 murder is made capital if it is "done for a pecuniary or other valuable consideration or pursuant to a contract or for hire."

"A way of framing the issue is suggested by analogy. Our cases reflect a long-established rule of the criminal law that an indictment need not specify which overt act, among several named, was the means by which a crime was committed. In *Andersen v. United States*, 170 U.S. 481 [18 S.Ct. 689, 42 L.Ed. 1116] (1898), for example, we sustained a murder conviction against the challenge that the indictment on which the verdict was returned was duplicitous in charging that theft occurred through both shooting and drowning. In holding that 'the Government was not required to make the charge in the alternative,' *id.*, at 504 [18 S.Ct. at 694], we explained that it was immaterial whether death was caused by one means or the other. Cf. *Borum v. United States*, 284 U.S. 596 [52 S.Ct. 205, 76 L.Ed. 513] (1932) (upholding the murder conviction of three co-defendants under a count that failed to specify which of the three did the actual killing); *St. Clair v. United States*, 154 U.S. 134, 145 [14 S.Ct. 1002, 1006, 38 L.Ed. 936] (1894). This fundamental proposition is embodied in the Federal Rules of Criminal Procedure 7(c)(1), which provides that '[i]t may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means.'"

Schad v. Arizona, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991). See *Thompson v. State*, 542 So.2d 1286 (Ala.Cr.App. 1988), affirmed, 542 So.2d 1300 (Ala.1989), cert. denied, 493 U.S. 874, 110 S.Ct. 208, 107 L.Ed.2d 161 (1989) (wherein the indictment charged that the defendant caused the victim's death "by striking her with his fist and by dragging her behind an automobile, either or both of which acts resulted in the aspiration of stomach contents and suffocation"). See also *Boulden v. State*, 278 Ala. 437, 179 So.2d 20 (1965) (wherein the court found counts of the indictment that "charge in the alternative the means by which the offense was committed," i.e., that the victim "died as a result of bullet wounds inflicted by a pistol or pistols or by a gun or guns, or as a result of cuts inflicted by use of a knife or other sharp instrument," were proper).

"In effect, the indictment charged, in a single count, alternative methods of proving the same crime. See *Sisson v. State*, 528 So.2d 1151 (Ala.Cr.App.1987), affirmed, *Ex parte State*, 528 So.2d 1159 (Ala.1988) ('Section 32-5A-191(a)(1) and (2) are merely two different methods of proving the same offense—driving under the influence.') 'When an offense may be committed by different means or with different intents, such means or intents may be alleged in an indictment in the same count in the alternative.' Alabama Code 1975, § 15-8-50. *Chappell v. State*, 52 Ala. 359, 360-61 (1875), held that in an indictment for common law robbery, the taking of the property from the victim may be charged to have been 'against his will, by violence to his person' or 'by putting him in such fear as [to cause him] unwillingly to part with the same' in different counts or in the same count in the alternative."

Williams v. State, 538 So.2d 1250, 1252 (Ala.Cr.App.1988). Thus, in *Tucker v. State*, 537 So.2d 59 (Ala.Cr.App.1988), this court held that an indictment that charged the capital murder of a police officer in alternative language complied with the statutory language of § 13A-6-2(a)(1) and § 13A-5-40(a)(5), *Code of Alabama* 1975. By statutory definition, the murder of a police officer is made capital when the officer is intentionally killed "while such officer is on duty" or "because of some official or job-related act or performance." This court reasoned:

"'An apparent purpose of these several provisions [§ 15-8-50, 51, 52] is to obviate the necessity of a multiplicity of counts, permitting one count to serve the purposes accomplished by several at common law....' *Horton v. State*, 53 Ala. 488, 492 (1875). The indictment was properly framed to conform to the proof. It charged only one offense—capital murder of a peace officer—which was committed for one of two reasons: either because the officer was trying to arrest Tucker's stepmother or because the officer was trying to arrest Tucker. This indictment completely satisfied the constitutional requirements of due process. *Summers v. State*, 348 So.2d 1126, 1132 (Ala.Cr.App.), cert. denied, *Ex parte Summers*, 348 So.2d 1136 (Ala.1977), cert. denied, 434 U.S. 1070, 98 S.Ct. 1253, 55 L.Ed.2d 773 (1978). See *Davis v. State*, 505 So.2d 1303, 1304 (Ala.Cr.App.1987) (operating a motor vehicle 'while under the influence of intoxicating liquors or narcotic drugs'); *Wilson v. State*, 84 Ala. 426, 4 So. 383 (1888) (murder 'by striking him in the head ... or by choking him with a piece of ... cord'); *King v. State*, 137 Ala. 47, 34 So. 683 (1903) (murder 'by hitting him or by striking him with a miner's pick, or by stabbing or cutting him with a knife, or with some sharp instrument')."

Tucker v. State, supra, at 61.

[5] As in *Tucker v. State*, supra, in the present case, the indictment in the present case charged only one offense—capital murder for hire—which was committed for one of two reasons: either Isaiah Harris was killed pursuant to a contract in order for Louise Harris and Lorenzo McCarter to continue their relationship, or Isaiah Harris was killed pursuant to a contract in order for the perpetrators to secure pecuniary gain, specifically $100 paid by Louise Harris and the proceeds of certain insurance policies on the victim's life, which were to be divided among all the participants. Thus, the indictment was not duplicitous.

[6] Moreover, the trial court's charge concerning jury unanimity were proper. The trial court instructed the jury that it had to reach a unanimous verdict. The appellant argues that because the trial court charged the jurors that all 12 must agree as to one of three possible verdicts—guilty of the capital offense, guilty of lesser-included offense, or not guilty—the trial court's instructions were improper. Specifically, the appellant argues that the instruction was error because it did not require the unanimity as to one of the alternative theories of the capital offense, i.e., murder for hire, murder pursuant to a contract, or murder for pecuniary gain. However, because we have previously concluded that the jury did not have to decide between this alternative language, the trial court committed no error in its instructions. See *Schad v. Arizona*, supra (it was constitutionally permissible for the jurors to agree on a unanimous verdict based on any combination of the alternative means to a single offense. 501 U.S. at ——, 111 S.Ct. at 2493-506).

IV

The appellant argues that the holding of "various proceedings" outside her presence violated her right to a fair trial and determination of punishment, as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by Alabama law. The appellant cites a number of pretrial proceedings at which she alleges that she was not present. The State submits that the record affirmatively shows that the appellant was present at each proceeding, except at the hearing at which her initial trial

counsel was removed (see Part I) and during a hearing on a motion to produce. The appellant cites three additional hearings from which she was absent, each of which addressed a number of subjects, and each of which was held in chambers; these hearings were held on March 8, 1989; April 10, 1989; and April 19, 1989, respectively. The record notes that Ellen Brooks (assistant district attorney), James H. Evans (district attorney), David Vickers, Knox Argo, and Barry Leavell were present at the first hearing. No mention is made of the appellant's presence. As to the second hearing, the record fails to specifically note who was present; however, during the course of the hearing, it is clear that Knox Argo, Eric Bowen, Ellen Brooks, and Ms. Baker were present. At the third hearing, the record indicates that James H. Evans, David Vickers, and Eric Bowen were present. There is no indication that the appellant was present at these latter two hearings, and we are unable to glean from the conversations during the hearings whether the appellant was present.

[7, 8] As to these pretrial hearings, which the appellant argues were held in her absence and at which the State argues the appellant was present, it should be noted that this court ordinarily will not presume error from a silent record. *Atchison v. State*, 565 So.2d 1186 (Ala.Cr.App.1990). However, even assuming that the record's failure to mention the appellant's presence indicates that she was in fact not present, we find no error in her absence during these hearings. The particular matters raised during these hearings, which the appellant argues required her presence in order to aid her counsel, were discussions of a public trial, evidentiary plans of the State, defense motions for the State to produce any statements allegedly made by the appellant, a defense motion requesting criminal records on certain State's witnesses,[2] and a brief rendition by the State of what it anticipated its case and evidence would entail. Because the trial court ordered the State to turn over its entire file on this case to the defense, there is no error in the defendant's absence during the State's brief rendition of its evidence, because the appellant could have suffered no prejudice. The other matters involved questions of law, involved no witness testimony, and from the discussions therein, it is clear that the appellant's presence would not have aided her defense. See *Maund v. State*, supra; *People v. Teitelbaum*, 163 Cal.App.2d 184, 329 P.2d 157 (1958), cert. denied, 359 U.S. 206, 79 S.Ct. 738, 3 L.Ed.2d 759 (1959) (wherein there was no error in the holding of eight conferences in chambers, because in none of these proceedings were any matters discussed as to which the defendant could have been of any aid to his counsel, and each concerned only questions of law).

As to the hearing on the appellant's motion to produce, from which the State concedes the appellant was absent, the State argues that defense counsel waived the appellant's right to be present, stating that her presence was not necessary to hear the legal arguments. The record indicates that, prior to beginning the hearing, the trial court asked defense counsel, "Do you waive your client's presence here for this hearing?" Defense counsel responded, "Yes, Your Honor. Apparently I'll have to—she's in the Elmore County jail. I did not have time to get her here." Defense counsel thereafter stated, "Your Honor, I don't think it's necessary for her to be here, to hear legal arguments on this point." During this hearing, the defense requested the production of certain telephone conversations from the appellant's house to the police department. The trial court denied this request as to all the conversations, but ordered the State to turn over any exculpatory material contained in those conversations. The defense also requested the production of tape-recorded statements by the defendant, which request the trial court granted. The defense also asked for production of any statements, including grand jury testimony, of certain State's witnesses who were not accomplices. The trial court denied this request as to all statements, but ordered the State to turn over any exculpatory material contained in the witnesses' statements.

[9] We decline to hold, in the present case, that defense counsel could waive the appellant's right to be present. See *Proffitt v. Wainwright*, supra.[3] However, because the hearing involved only questions of law, the appellant's presence would have been needless. Moreover, in light of the trial court's favorable rulings for the appellant, she was not prejudiced by her absence. See *State v. Iverson*, 187 N.W.2d 1 (N.D.), cert. denied, 404 U.S. 956, 92 S.Ct. 322, 30 L.Ed.2d 273 (1971) (wherein, although the court found error in the defendant's absence from four conferences held in chambers, the court held that the error was harmless, emphasizing that in three of the conferences the defendant obtained favorable evidentiary rulings).

V

[10] The appellant argues that the trial court erred in denying her motion for a change of venue. The record indicates that, prior to trial, a hearing was held on the appellant's motion for a change of venue, during which an investigator testified for the appellant. He stated that he had taken a survey of 25 to 30 people in different areas of Montgomery County. He testified that he had driven around the county, stopping at various locations, and that he had attempted to question different type of people. He admitted that his survey was informal and unscientific and that he had no specialized training or polling skills. He testified that his findings revealed that 35% to 40% of the people questioned had a fixed opinion as to the appellant's guilt. The appellant offered no further evidence in support of her motion. This showing was not sufficient to prove that the community was saturated with prejudicial publicity.

"Absent a showing of abuse of discretion, a trial court's ruling on a motion for change of venue will not be overturned. *Ex parte Magwood*, 426 So.2d 929, 931 (Ala.), *cert. denied*, 462 U.S. 1124, 103 S.Ct. 3097, 77 L.Ed.2d 1355 (1983). In order to grant a motion for change of venue, the defendant must prove that there existed actual prejudice against the defendant or that the community was saturated with prejudicial publicity. *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); *Franklin v. State*, [illegible] So.2d 1353 (Ala.Crim.App.1982). Newspaper articles or widespread publicity, without more, are insufficient to grant a motion for change of venue. *Anderson v. State*, 362 So.2d 1296, 1298 (Ala.Crim.App.1978). As the Supreme Court explained in *Irvin v. Dowd*, 366 U.S. 717, 723, 81 S.Ct. 1639, 1642–43, 6 L.Ed.2d 751 (1961):

> " 'To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. . . .'

"The standard of fairness does not require jurors to be totally ignorant of the facts and issues involved. *Murphy v. Florida*, 421 U.S. 794, 799–800, 95 S.Ct. 2031, 2035–2036, 44 L.Ed.2d 589 (1975). Thus, '[t]he proper manner for ascertaining whether adverse publicity may have biased the prospective jurors is through the voir dire examination.' *Anderson v. State*, 362 So.2d 1296, 1299 (Ala.Crim.App. 1978)."

2. The trial court noted that the prior criminal record of any State's witnesses should be turned over by the prosecutor pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Moreover, the trial court ordered that the State turn over any information on prior convictions of State's witnesses if they were known to them. The trial court also ordered the State's entire file to be turned over to the appellant. Eventually, during the trial, the court allowed defense counsel to ask certain questions of State's witness Freddie Patterson concerning his prior criminal record.

3. In *Proffitt v. Wainwright*, the court held that the trial court erred in allowing a post-trial sentencing hearing to be conducted in the defendant's absence after a purported waiver of his presence by defense counsel. The court held that, even if it were to follow the cases cited by the State for a departure from the no-waiver rule, at least a "knowing and voluntary consent" would be required and, because the defendant was neither apprised of the hearing nor afforded an opportunity to assert his right to attend, he could not have knowingly or voluntarily waived his right to be present.

Ex parte Grayson, 479 So.2d 76, 80 (Ala. 1985), cert. denied, 474 U.S. 865, 106 S.Ct. 189, 88 L.Ed.2d 157 (1985).

[11] Moreover, the appellant has failed to prove that there existed any actual prejudice against her. The jurors who indicated that they had any knowledge of the case were questioned individually concerning the extent of their knowledge, the source of that knowledge, and the ability to disregard the information and decide the case based upon the facts presented in court. No juror remaining on the venire indicated that he or she could not decide the case based on the facts presented and on the law as instructed by the court. Thus, there was no actual prejudice demonstrated by the appellant resulting from pretrial publicity. *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961).

[12] Although the appellant further claims error in the trial court's failure to allow individual voir dire of every potential juror, individual voir dire was undertaken where there was any reason for follow-up, including any indication of pre-trial knowledge of the case. Whether a capital defendant is allowed individual voir dire of each prospective juror is a matter vested within the discretion of the trial court. *Hallford v. State*, 548 So.2d 526, 538–39 (Ala.Cr.App. 1988), affirmed, 548 So.2d 547 (Ala.), cert. denied, 493 U.S. 945, 110 S.Ct. 354, 107 L.Ed.2d 342 (1989). We find no abuse of discretion in this case. *Kuenzel v. State*, 577 So.2d 474, 484 (Ala.Cr.App.1990), affirmed, 577 So.2d 531 (Ala.1991), cert. denied, — U.S. —, 112 S.Ct. 242, 116 L.Ed.2d 197 (1991).

[13] The appellant also claims that the trial court erred in denying her request to have the venire complete a questionnaire. However, "the trial court has discretion regarding how the voir dire examination of jury will be conducted, and ... reversal can be predicated only upon an abuse of that discretion." *Bui v. State*, 551 So.2d 1094, 1110 (Ala.Cr.App.1988), affirmed, 551 So.2d 1125 (Ala.1989), vacated on other grounds, 499 U.S. 971, 111 S.Ct. 1613, 113 L.Ed.2d 712 (1991). There was no abuse of discretion by the trial court as to this matter.

[14] The appellant further claims that the trial court erred in failing to ask potential jurors whether any of them had fixed opinions in favor of the death sentence. However, it should be noted that this jury returned a sentence of life without parole, and the rule established in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), does not apply where the jury does not recommend the death penalty. See *Neelley v. State*, 494 So.2d 669, 680 (Ala.Cr. App.1985), affirmed, 494 So.2d 697 (Ala.1986), cert. denied, 480 U.S. 926, 107 S.Ct. 1389, 94 L.Ed.2d 702 (1987); *Bumper v. North Carolina*, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968). Moreover, because the appellant failed to object to the trial court's failure to question the jurors, this alleged error would have to amount to plain error for the appellant to be entitled to relief. However, this court has held that the failure of the trial court to question potential jurors concerning their views in favor of the death penalty does not constitute plain error. *Henderson v. State*, 583 So.2d 276 (Ala.Cr.App.1990), affirmed, 583 So.2d 305 (Ala.1991), cert. denied, — U.S. —, 112 S.Ct. 1268, 117 L.Ed.2d 496 (1992).

VI

[15] The appellant argues that it was error for sheriff's deputies to manage and be in charge of the jurors during their sequestration and deliberations, in light of the fact that the victim was a deputy sheriff. The record reveals that the appellant objected on this ground at trial, and that the trial court responded that the deputies had long been assigned to court detail and that the trial court was familiar with them. The trial court further stated that the deputies were "well aware of their responsibilities." There is no indication or claim by the appellant of any improper behavior by the deputies in this regard or of any improper communications between the deputies and the jury. Thus, there is no evidence of prejudice to the appellant.

In *Holloway v. State*, 477 So.2d 487 (Ala. Cr.App.1985), overruled on other grounds, *Ex parte McCrea*, 554 So.2d 336 (Ala.1988) a manslaughter case, the defendant argued

that because the sheriff and several deputies were witnesses for the State, the trial court should not have allowed the sheriff's department to manage the jury and to sequester them. In that case, this court noted that there was no evidence of prejudice to the defendant. This court held:

"'Reversible error will not be presumed, but the burden is upon the appellant to show injury in this respect.' *Bowens v. State*, 54 Ala.App. 491, 309 So.2d 844 (1974), cert. denied, 293 Ala. 746, 309 So.2d 850 (1975).

"Section 12-16-10, Code of Alabama 1975, establishes the duty of the sheriff to provide suitable lodging and meals for members of a sequestered jury. Furthermore, the sheriff and deputies are the proper officers to have charge of the jurors during their deliberations, and that includes the rendering of such services to them as their physical conditions require. *Pounders v. State*, 55 Ala.App. 204, 314 So.2d 123 (1975)."

Holloway v. State, supra, at 488. Because there is no indication of any prejudice to the appellant in the deputies' overseeing of the jury, we find no error as to this matter.

VII

[16] The appellant argues that the trial court erred in denying her challenges for cause of three veniremembers who indicated that they had knowledge of the case from pretrial publicity, as well as her challenge of another veniremember who knew the victim. Each of the three veniremembers who had knowledge of the case from pretrial publicity was questioned individually by the trial court concerning this knowledge. All three stated that they only remembered the basic facts of the case, and two of the three specifically testified that they tended not to believe what they heard through the media. All three potential jurors stated that they had no doubts that they could render a fair, just, and impartial verdict based on the facts presented in court and the law as instructed by the trial court. The mere knowledge of the facts and issues in this case, as in any case, does not disqualify a potential juror from serving on the case. *Kinder v. State*, 515 So.2d 55, 59–61 (Ala.Cr.App.1987). See also *Kuenzel v. State*, supra, at 483–84. The appellant also alleges error in the trial court's refusal to excuse for cause a potential juror who knew the victim personally and professionally and who was also familiar with the facts and circumstances of the crime. The following transpired during the individual voir dire of this prospective juror:

"THE COURT: [Prospective juror], you had indicated that you had either read or heard or seen something about this matter in the past; is that correct?

"PROSPECTIVE JUROR: Yes, sir.

"THE COURT: Could you, the best you can recall, tell us what you know about it and from what source, what you heard, what you read, what you saw?

"PROSPECTIVE JUROR: Well, mainly, you know, from what I read in newspaper accounts and [television] accounts. Also, Judge, there's one thing I don't think you asked this morning, I don't know the significance of it but it may be, but from a professional point of view I knew Mr. Harris.

"THE COURT: Okay. Can you tell us how you knew him?

"PROSPECTIVE JUROR: He used to bring inmates to Kilby and as a correctional officer we had a relationship there.

"THE COURT: Okay.

"PROSPECTIVE JUROR: And also, two or three, I would think two or three occasions I might have been with him socially.

"THE COURT: Okay. What type of social?

"PROSPECTIVE JUROR: Just, you know, get together like I think he was a retired military, so am I. I think one occasion I met him at the club. Another occasion I think there was some correctional officers getting together. He was on the scene, you know, just for a social affair.

"THE COURT: Do you feel that personal acquaintance with him—

"PROSPECTIVE JUROR: I didn't know him personally, per se. I just, you know, just, as I say, just a relationship we had on those occasions.

"THE COURT: Do you feel like whatever relationship—

"PROSPECTIVE JUROR: No, sir.

"THE COURT:—You have with him would in any way affect your ability to render a fair, just, and impartial verdict from this case?

"PROSPECTIVE JUROR: No, sir, I don't think it has any bearing. I just wanted to tell you so it wouldn't come up later.

"THE COURT: I appreciate you telling us.

"PROSPECTIVE JUROR: But it had no bearing on my making a judgment fairly, a fair decision.

"THE COURT: Do you recall what you read in the newspaper accounts about this or heard on t.v.?

"PROSPECTIVE JUROR: Just the incident itself.

"THE COURT: What about it?

"PROSPECTIVE JUROR: The fact that they had found his car on the side of the road and, um, he was on his way to work, basically.

"THE COURT: Do you recall anything about who may have been arrested for it, or who was alleged—

"PROSPECTIVE JUROR: Yes, sir, they did indicate at a later date that his wife and some other people, I don't recall the names—

"THE COURT: Ym—hum.

"PROSPECTIVE JUROR: —Have been implicated.

"THE COURT: Based on what you may have read or heard do you feel like you'd be able to put that aside and listen only to the facts as you hear them in Court?

"PROSPECTIVE JUROR: Yes, sir.

"THE COURT: And render a fair, just, and impartial verdict?

"PROSPECTIVE JUROR: Yes, sir.

"THE COURT: Do you feel like you'd be tainted in any way based on what you've read or heard in the past about this?

"PROSPECTIVE JUROR: No, sir, none whatsoever.

"THE COURT: So you have no doubt that you can be fair in this case?

"PROSPECTIVE JUROR: Yes, sir."

"The facts that the victim and a prospective juror are personally acquainted and work for the same company do not automatically disqualify a juror for cause (cite omitted). Employment of the juror by the same company that employed the victim is not a prima facie indication of interest or bias on the part of the juror." *Carlton v. State*, 415 So.2d 1241, 1242 (Ala.Cr.App.1982), citing *Glenn v. State*, 395 So.2d 102, 107 (Ala.Cr.App.1980), cert. denied, 395 So.2d 110 (Ala. 1981).

"The grounds on which a juror may be challenged for cause are set out in § 12–16–150, *Code of Alabama* (1975). ... Furthermore, grounds for challenge for cause under the common law still exist where they are not inconsistent with § 12–16–150. *Stewart v. State*, 405 So.2d 402, 407 (Ala.Cr.App.1981); *Felton v. State*, 46 Ala. App. 579, 246 So.2d 467 (1971); *Mullis v. State*, 258 Ala. 309, 62 So.2d 451 (1952).

"'The test to be applied is can the juror eliminate the influence of his scruples and render a verdict according to the evidence. Ordinarily a juror is not disqualified where it appears that he is willing to follow the instructions of law given by the trial court and is able to decide the case impartially according to the evidence notwithstanding his scruples. The determination of this question is based on the juror's answers and demeanor and is within the sound discretion of the trial judge. *Tidmore [v. City of Birmingham*, 356 So.2d 231 (Ala.Cr.App.1977), *cert. denied*, 356 So.2d 234 (Ala.1978)]. A juror is incompetent whose answers show that he would follow his own views regardless of the instructions of the court. *Watwood v. State*, 389 So.2d 549, 550 (Ala.Cr.App.), *cert. denied*, 389 So.2d 552 (Ala.1980).

"*Barbee v. State*, 395 So.2d 1128, 1130–31 (Ala.Cr.App.1981)....

"'Thus, where a juror states that he has opinions but that he would try the case fairly and impartially according to the law and the evidence and that he would not allow his opinion to influence his decision, it is not error for a trial judge to deny a challenge for cause. *Howard v. State*, 420 So.2d 828, 831 (Ala.Cr.App.1982). "A juror who brings his thoughts out into the open in response to voir dire questions may be the one who later 'bends over backwards' to be fair...." *Clark v. State*, 443 So.2d 1287, 1289 (Ala.Cr.App.1983).' "*Mahan v. State*, 508 So.2d 1180 (Ala.Cr.App. 1986)."

Kinder v. State, 515 So.2d 55, 60–61 (Ala.Cr. App.1986).

[17] Because this potential juror stated that he would base his decision on the evidence presented at trial and on the judge's instructions as to the law, we find no abuse of discretion by the trial court in denying the appellant's challenge for cause of this potential juror. "A trial court's ruling on challenges for cause based on bias is entitled to great weight and will not be disturbed on appeal unless clearly shown to be an abuse of discretion." *Stewart v. State*, 405 So.2d 402, 408 (Ala.Cr.App.1981).

VIII

The appellant argues that the trial court erred in limiting her cross-examination of a State's witness concerning an alleged prior conviction and probationary status, which she contends violated her Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution and Alabama law. The appellant refers to State's witness Alonzo Trimble, who testified that he worked with Lorenzo McCarter and that he was approached by him and solicited to commit the murder.

The record reveals that, during the cross-examination of Trimble, defense counsel asked if the witness was still on probation. The witness responded that he was not. The prosecutor then asked that the question and answer be stricken, as there was "no basis whatsoever for [the defense counsel's] asking that question." The prosecutor indicated that she had no knowledge that the witness had ever been on probation, and defense counsel responded that the defense had been informed that the witness was on probation. Thereafter, a hearing was held in chambers and the prosecutor again asserted that defense counsel had no basis for his question and was merely conducting a "fishing expedition." When defense counsel was asked by the trial court if he had information that the witness was on probation, he responded:

"I don't know whether he is or not, Judge. I just don't know. They haven't furnished us a rap sheet on him. [The prosecutor] says she doesn't have it in her file and I believe her, you know. It's our understanding that he's convicted of an offense and was on probation. Maybe it was at the time he gave the statements. Maybe he's not any longer. I don't see why don't just ask him."

The prosecutor responded that the question had been asked and answered, but complained that the question had implied that he may have been on probation, so the damage had been done. Thereafter, Trimble was called into chambers and asked by the trial court if he had ever been convicted of a crime involving moral turpitude. The witness responded that "they" tried to convict him of "a stolen vehicle"; however, he indicated he was never convicted. The witness then stated that he had been charged with third degree assault in municipal court about three months prior to the instant trial. He responded that those charges were brought after his involvement in the present case. Subsequently, while the parties were still in chambers, an assistant prosecutor asked t witness if he had ever been on probation. The witness responded that he had been on unsupervised probation but that he never had a probation officer. The following then transpired:

"THE COURT: What were you on unsupervised probation for?

"THE WITNESS: They had tried to accuse me [of] stealing a truck, but I didn't get no—I didn't do any time behind it.

"THE COURT: I didn't ask you if you'd done any time. How were you on unsupervised probation? You can't be on any kind of probation unless you're convicted.

"THE WITNESS: I was under the custody of my mother for a certain period of time and not getting in any kind of trouble.

"THE COURT: How old were you?

"THE WITNESS: Um, I think I was twenty-seven when it happened.

"THE COURT: How long ago was that?

"THE WITNESS: It's been about a year, maybe two years.

"THE COURT: Was that during the period of time this all was going on?

"THE WITNESS: Yeah, it was.

"THE COURT: Who put you on unsupervised probation?

"THE WITNESS: My lawyer was, um, Mr. Brooks.

"[PROSECUTOR]: I don't believe it.

"THE COURT: Well, who put you on unsupervised probation?

"THE WITNESS: The judge.

"THE COURT: What judge?

"THE WITNESS: Um, I can't recall his name cause it was in Tuskegee.

"THE COURT: So you're telling the Court you were on unsupervised probation for stealing a car?

"THE WITNESS: They said I stole it but they found out, you know, I didn't steal the car. Okay. The damage that was [done] to the car, we agreed I paid the damage that was [done] on the car and I paid for the damage and they told me, you know, I was in custody of my mother, you know, for a certain period of time till I paid the money and after I paid the money.

"THE COURT: Why did you pay the damage if you didn't steal the car?

"THE WITNESS: Well, the car was in my hands at the time and the car got away from me and I was [held] responsible for it cause the keys [were given] to me.

"THE COURT: By who? The owner of the car?

"THE WITNESS: The owner.

"THE COURT: That's about as far as I know to go to find out.

"[DEFENSE COUNSEL]: Is my question proper now, Your Honor?

"THE COURT: I don't know whether it is or it isn't based on what he is saying."

Thereafter, when cross-examination was continued in the presence of the jury, the following transpired:

"Q. Mr. Trimble, have you been convicted of a crime involving moral turpitude?

"[PROSECUTOR]: Object, Your Honor. McElroy's is clear that's not the way to ask the question. Must be specific about the crime itself.

"THE COURT: Lay your predicate.

"Q. Have you been convicted of a crime of moral turpitude concerning a theft of an automobile?

"[PROSECUTOR]: Objection, Your Honor. That's improper way to ask it and I cite the Court to McElroy's at section—

"THE COURT: Overruled. You may answer.

"Q. Mr. Trimble?

"A. Repeat that again?

"Q. Yes, sir. Have you been convicted of a crime involving moral turpitude concerning the theft of an automobile?

"A. Yes, I have.

"Q. Okay. And were you convicted of that, oh, about a year ago in Tuskegee?

"A. Yes.

"Q. All right. And were you put on probation?

"A. I didn't have a probation officer.

"[PROSECUTOR]: Objection, Your Honor. He's going too far now.

"THE COURT: Sustained.

"(WHEREUPON, the following occurred at the bench:)

"[DEFENSE COUNSEL]: Judge, it was my understanding the ruling was changed. Once we showed the offense we would be allowed to show he was on probation. He admitted the offense, he admitted the theft of—moral turpitude involving theft of an automobile and I'd like to show he was on probation at this time.

"[PROSECUTOR]: Judge, not under impeachment.

"THE COURT: For what purpose?

"[DEFENSE COUNSEL]: To impeach these statements, his testimony here today.

"THE COURT: How?

"[DEFENSE COUNSEL]: I think it shows he would be inclined to cooperate with the State.

"THE COURT: Sustain the objection unless you show me some law.

"[DEFENSE COUNSEL]: Okay. Thank you."

Thereafter, during the defense counsel's closing argument, he argued to the jury that Trimble's alleged conviction and probation provided the motive and bias for his testimony against the appellant.

[18] In the present case, whether the witness was placed on probation arising out of a conviction in another county, i.e., Macon County, does not indicate possible bias in testifying for the State in a case arising out of Montgomery County.

"'It is generally held, even in jurisdictions where such evidence is not ordinarily admissible, that the fact that a witness has been arrested or charged with crime may be shown or inquired into where it would reasonably tend to show that his testimony might be influenced by interest, bias, or a motive to testify falsely. This principle has been held applicable in cases where criminal charges are pending in the same court against a witness for the prosecution in a criminal case at the time he testifies, as a circumstance tending to show that his testimony is or may be influenced by the expectation or hope that, by aiding in the conviction of the defendant, he would be granted immunity or rewarded by leniency in the disposition of his own case. But it has been held that the pendency of charges against the witness in another county or jurisdiction cannot be shown under this theory of admissibility.'"

Woodard v. State, 489 So.2d 1, 2–3 (Ala.Cr.App.1986), quoting 81 Am.Jur.2d *Witnesses* § 589, at pp. 597–98 (1976).

Because the district attorney's office in Montgomery County could not have made any recommendations toward his sentencing in Macon County, the appellant could not have been helped by testifying in the present case. Nor is there any indication in the record that he was promised any help. Therefore, because the "extent of cross-examination on irrelevant facts, for the purpose of testing bias or credibility of the witness's testimony, is a matter resting largely in the discretion of the trial court, [whose] ruling will not be disturbed unless it appears that it has abused its discretion to the prejudice of the complaining party," *Beavers v. State*, 565 So.2d 688, 689–90 (Ala.Cr.App.1990), we find no error in the instant case.

IX

The appellant argues that Trimble's testimony concerning out-of-court statements made to him by Lorenzo McCarter and by the appellant constituted inadmissible hearsay. During the trial, when the appellant objected to the admission of these statements on this ground, the prosecutor responded that the statements were admissible pursuant to the coconspirator exception to the hearsay rule. On appeal, as he did at trial, the appellant argues that the State did not establish the existence of a conspiracy prior to admitting these statements, and that, therefore, the exception did not and does not apply in the present case.

"'Where proof of a conspiracy exists, any act or statement made by an accused's co-conspirator in the commission of the crime, done or made before the commission of the crime, during the existence of the conspiracy and in furtherance of a plan or design is admissible against the accused.' *Lewis v. State*, 414 So.2d 135, 140 (Ala.Crim.App.), *cert. denied*, 414 So.2d 140 (Ala.1982). *See also Nance v. State*, 424 So.2d 1358 (Ala.Crim.App.1982). Statements of a co-conspirator may be admitted against another co-conspirator when the State presents prima facie evidence of the existence of a conspiracy. *Lewis*. It is well settled that a conspiracy need not be proved by direct and positive evidence and may be proved by circumstantial evidence. *Lewis*; *Stinson v. State*, 401 So.2d 257 (Ala.Crim.App.), *cert. denied*, 401 So.2d 262 (Ala.1981). In determining whether the State presented a pri-

ma facie case, this court will consider the evidence in the light most favorable to the State. *Hutcherson v. State*, 441 So.2d 1048 (Ala.Crim.App.1983); *Smelcher v. State*, 385 So.2d 653 (Ala.Crim.App.1980)."

Salter v. State, 578 So.2d 1092, 1094 (Ala.Cr.App.1990), writ denied, 578 So.2d 1097 (Ala.1991).

[19] If the State presented sufficient evidence that McCarter and the appellant were involved in the conspiracy, evidence of McCarter's statements was admissible against the appellant, regardless of whether the prima facie showing of the existence of the conspiracy was made prior to the admission of the statements. The order of proof in this context is not a legal requisite.

"While it is preferable that a co-conspirator testify after the prima facie showing of the existence of a conspiracy, such order of proof is not mandatory. The order of proof requirement is for the purpose of expediting the trial and saving the valuable time of the trial court, rather than protecting or securing any supposed right a defendant might have. *Morton v. State*, 338 So.2d 423, 425 (Ala.Cr.App.), *cert. denied*, 338 So.2d 428 (Ala.1976); *Conley [v. State*, 354 So.2d 1172 (Ala.Cr.App.1977)]."

Nance v. State, 424 So.2d 1358, 1365 (Ala.Cr.App.1982).

"Furthermore, '[e]ven if testimony relating statements made by confederates is objectionable as premature, in that independent proof of conspiracy has not been established before its admittance, subsequent proof of the conspiracy cures any error in the premature admission. *Conley v. State*, 354 So.2d 1172 (Ala.Cr.App.1977).' *Tucker v. State*, 454 So.2d 541, 546–47 (Ala.Cr.App.1983), reversed on other grounds, *Ex parte Tucker*, 454 So.2d 552 (Ala.1984)."

Creech v. State, 508 So.2d 302, 304 (Ala.Cr.App.1987). See also *Inzer v. State*, 447 So.2d 818, 848–49 (Ala.Cr.App.1983), cert. denied, 447 So.2d 850 (Ala.1984).

[20] In the present case, prior to Trimble's testimony, the State introduced a witness's testimony that McCarter, Hood, and Sockwell were all present and all aided in the commission of the murder. The witness further testified that a female called McCarter's beeper just prior to the victim's death, stating that the victim was leaving. The State also presented testimony to the effect that McCarter and the appellant were sexually involved and that, when asked if McCarter could have committed the offense, the appellant responded that, "If he did kill him, I did not tell him to." There was further circumstantial evidence concerning the appellant's behavior upon learning that her husband was missing and, thereafter, dead. The appellant was able to become extremely calm for questioning, she gave a tour of her home to one of the officers, and, when asked how she was able to remain so calm, she acknowledged that she and the victim were experiencing marital problems and that he drank excessively and abused her. Thereafter, Trimble testified that, while he was at work with McCarter, McCarter got beeped and went to answer the call. McCarter then called Trimble to the telephone, saying that someone wanted to speak to him. Trimble testified that the person on the telephone identified herself as Louise Harris and that she told him that she needed "someone to do a job." She further stated that she was referring to killing someone, and that the job had to be done prior to Friday because the victim was "spending into some of the insurance money and he was adding onto the house." Trimble testified that he recognized the voice as that of Louise Harris, whom he had met on previous occasions.

Because the conspiracy was clearly proved by the State, McCarter's statements to Trimble, asking him to commit the murder or to find someone who would commit the murder, were admissible. Harris's statement was admissible as an admission. See C. Gamble, *McElroy's Alabama Evidence* (4th Ed.1991) § 264.01(1).

X

The appellant argues that her conviction and sentence were obtained by emotional appeals to the suffering of the victim's family in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Specifically, she argues that the trial court erred by allowing the victim's sister to sit at the table for the prosecution during trial, and she claims that § 15–14–55, *Code of Alabama* 1975, which permits a victim's family member to sit at the table for the prosecution at trial, is unconstitutional in the context of a capital case. The appellant also argues the trial court erred by allowing the victim's sister to take the stand and to testify about allegedly irrelevant matters, and by allowing the State to otherwise emphasize the presence and suffering of the victim's family members. She also argues that the State sought to obtain a verdict and a sentence based on the victim's characteristics. The appellant cites to *South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989), and *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987).

The appellant's arguments, based on *South Carolina v. Gathers* and *Booth v. Maryland* must fail because both of these cases were specifically overruled by the United States Supreme Court in *Payne v. Tennessee*, — U.S. —, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). See *Smith v. State*, 588 So.2d 561 (Ala.Cr.App.1991). See also *McWilliams v. State*, [Ms. 6 Div. 190, August 23, 1991] — So.2d — (Ala.Cr.App.1991).

[21] The appellant's arguments concerning presence at the table for the prosecution of the victim's sister have been previously addressed by this court in *Henderson v. State*, 583 So.2d 276 (Ala.Cr.App.1990), affirmed, 583 So.2d 305 (Ala.1991), cert. denied, — U.S. —, 112 S.Ct. 1268, 117 L.Ed.2d 496 (1992).

"The presence of a victim seated at the counsel table for the prosecution is specifically provided for by 'the Alabama Crime Victims' Court Attendance Act,' codified at §§ 15–14–50 *et seq.*, *Code of Alabama* 1975. This act gives victims of a criminal offense the right to be present in the courtroom and seated alongside the prosecutor during the trial of the individual charged with that offense.

"The appellant argues, however, that this statute is unconstitutional generally, or alternatively, with regard to capital murder cases specifically. This argument has been previously addressed—and rejected—by this Court in both capital as well as non-capital cases. In *Crowe v. State*, 485 So.2d 351, 362–63 (Ala.Cr.App. 1984), *reversed on other grounds*, 485 So.2d 373 (Ala.1985), *cert. denied*, 477 U.S. 909, 106 S.Ct. 3284, 91 L.Ed.2d 573 (1986), a capital murder case in which the death penalty was imposed, this Court specifically rejected the notion that the seating of the victim's widow at counsel table for the prosecution violated any constitutional rights of the accused. Likewise, in *Anderson v. State*, 542 So.2d 292, 304–05 (Ala.Cr.App.1987), *writ quashed*, 542 So.2d 307 (Ala.1989), cert. denied, 493 U.S. 834, 110 S.Ct. 116, 107 L.Ed.2d 77 (1989), a capital murder case in which life imprisonment without possibility of parole was imposed, we rejected this argument, holding as follows:

"'Furthermore, under § 15–14–55, *Code of Alabama* (1975), "a victim of a criminal offense shall be exempt from the operation of rule of court, regulation, or statute or other law requiring separation or exclusion of witnesses from court in criminal trials or hearings." Under § 15–14–56(a), "[w]henever a victim is unable to attend such trial or hearing or any portion thereof by reason of death ... the victim's family may select a representative who shall be entitled to exercise any right granted to the victim pursuant to the provisions of this article." ...'"

Id. at 285–86. Therefore, the presence of the victim's family and evidence of victim impact did not constitute error.

[22] Moreover, the appellant argues that the prosecutor erred by dwelling on and emphasizing the victim's role as a deputy sheriff, thereby prejudicing her case pursuant to *Booth v. Maryland*, supra and *South Carolina v. Gathers*, supra. However, as previously noted, these cases were overruled by *Payne v. Tennessee*, supra. Furthermore, the testimony concerning the victim's role as a police officer was relevant to the State's evidence presented during the guilt phase, as this case was initially brought on two counts, the second of which charged the

appellant with the capital murder of a law enforcement officer. § 13A-5-40(a)(5), *Code of Alabama* 1975.

XI

[23] The appellant argues that her statements made to officers investigating her husband's death on the night of the murder were inadmissible, because, she argues, they were taken in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments and of the constitution of the State of Alabama. Specifically, the appellant argues that the statements she made to her husband's coworkers should have been held inadmissible because, she says, she was never given the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). However, the record indicates that the appellant was not subjected to a custodial interrogation so as to trigger the safeguards of *Miranda v. Arizona*, supra. When the appellant made these statements, she was present in her home, and the officers were there to inform her of her husband's death and to investigate any leads that the appellant may be able to provide, as well as to determine whether the victim had any weapons at his home. The appellant's body had just been discovered, and the officers had no reason to suspect that the appellant was in any way connected with the death.

"[C]ompliance with the procedural safeguards of *Miranda* is not necessary unless the confession is a product of 'custodial interrogation' or 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' *Id.* at 444, 86 S.Ct. at 1612 (footnote omitted). 'It is settled that the safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to a "degree associated with formal arrest." ' *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S.Ct. 3138, 3150, 82 L.Ed.2d 317 (1984) (*quoting California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983) (*per curiam*)). The Supreme Court reiterated the reasons for the *Miranda* safeguard in *Minnesota v. Murphy*, 465 U.S. 420, 429-30, 104 S.Ct. 1136, 1143-44, 79 L.Ed.2d 409 (1984), as follows:

" 'Not only is custodial interrogation ordinarily conducted by officers who are "acutely aware of the potentially incriminatory nature of the disclosures sought," *Garner v. United States*, [424 U.S. 648], at 657 [96 S.Ct. 1178 at 1184, 47 L.Ed.2d 370] [1976], but also the custodial setting is thought to contain "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda v. Arizona*, 384 U.S. at 467 [86 S.Ct. at 1624]. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 246-247 [93 S.Ct. 2041, 2057-2058, 36 L.Ed.2d 854] (1973). To dissipate "the overbearing compulsion . . . caused by isolation of a suspect in police custody," *United States v. Washington*, 431 U.S. 181, 187, n. 5, [97 S.Ct. 1814, 1819 n. 5, 52 L.Ed.2d 238] (1977), the *Miranda* court required the exclusion of incriminating statements obtained during custodial interrogation unless the suspect fails to claim the Fifth Amendment privilege after being suitably warned of his right to remain silent and of the consequences of his failure to assert it. 384 U.S., at 467-469, 475-477 [86 S.Ct. at 1624-1625, 1628-1629]. We have consistently held, however, that this extraordinary safeguard "does not apply outside the context of the inherently coercive custodial interrogations for which it was designed." *Roberts v. United States*, 445 U.S. [552] at 560 [100 S.Ct. 1358 at 1364, 63 L.Ed.2d 622] [1980].'

"It is the compulsive aspect of custodial interrogation, and not the strength or content of the officer's suspicion at the time the questioning was conducted, which led the Court to impose the *Miranda* requirements with regard to custodial questioning. *Beckwith v. United States*, 425 U.S. 341, 346-47, 96 S.Ct. 1612, 1616, 48 L.Ed.2d 1 (1976). . . .

". . . .

"Among the factors to be considered in making this determination are whether the suspect was questioned in familiar or, at least, neutral surroundings; the number of law enforcement officers present at the scene; the degree of physical restraint of the suspect; the duration and character of the questioning; and how the suspect got to the place of questioning. *See* 1 LaFave and Israel, *supra*, at § 6.6(c). Other pertinent factors are the language used to summon the individual; the extent to which the person is confronted with evidence of guilt; and the degree of pressure applied to detain the individual. *Hooks v. State*, slip op. at 36 [534 So.2d 329 at 348] (*quoting United States v. Wauneka*, 770 F.2d 1434, 1438 (9th Cir.1985)). Furthermore, '[b]ecause the Court in *Miranda* expressed concern with the coerciveness of situations in which the suspect was "cut off from the outside world" and "surrounded by antagonistic forces" in a "police dominated atmosphere" and interrogated "without relent," circumstances relating to those kinds of concerns are also relevant on the custody issue.' 1 LaFave and Israel, *supra*, at § 6.6(f).

"In regard to the 'very significant factor' of the place of the interrogation, *id.*, it has been observed that 'courts are much less likely to find the circumstances custodial when the interrogation occurs in familiar or at least neutral surroundings.' *Id.* at 6.6(e). The underlying rationale is that since the suspect is in familiar surroundings, he is not subjected to the same pressures as in the police-dominated atmosphere of the police station. *Id.*

"465 U.S. at 433, 104 S.Ct. at 1145 (footnote omitted)."

Finch v. State, 518 So.2d 864, 867-69 (Ala.Cr.App.1987).

In the present case, the appellant was questioned in her home by officers, some of whom had known the appellant socially. The appellant was not a suspect at the time and was not in any way restrained. She could not have reasonably believed that she was in custody. Any statements or comments that she made were willingly volunteered, within the protection of her own home.

XII

The appellant argues that the trial court erred in restricting his cross-examination of Freddie Patterson, who was present in the car with Lorenzo McCarter, Michael Sockwell, and Alex Hood when the victim was shot. Patterson was not charged in the present case, and the State presented evidence that he had no knowledge of the planned murder. The appellant argues that she should have been allowed to question the witness concerning an unrelated felony charge, which was pending against him at the time he was brought in for questioning in the present case. Patterson later pleaded guilty to a misdemeanor on this charge. The appellant argued that she had the right to question Patterson concerning this charge, as well as his other arrests and convictions, in order to demonstrate bias or self-interest.

The record reveals that, during the direct examination of Patterson, he testified that he went to the police station to talk to an officer concerning this case approximately four days after the other three men who had been present in the automobile had been arrested. He testified that he voluntarily went to the police department and "turned [himself] in and talked to them." He further testified that he was never charged in this case, but that, when he turned himself in, a charge of leaving the scene of an accident was pending against him in Montgomery County. He testified that he subsequently pleaded guilty to that charge. He further testified that he had been convicted of theft of property in the second degree, arising from an incident in Autauga County. Thereafter, during a conference outside the presence of the jury, the trial court held that the defense counsel would be allowed to question the witness concerning the conviction in order to show possible bias and self-interest. However, he ruled that the defense counsel would not be allowed to go into the details of the unrelated offense. Defense counsel responded that he had no intention of so questioning the witness. During a later conference outside the hearing of the jury, defense counsel stated that he had a copy of Patterson's "rap sheet" and that he wished to question the witness concerning the convictions. Defense stated that he should be permitted to do so, because the State had previously "opened the door" to this subject by asking the witness whether

he had ever been in trouble with the law. The trial court held that the State's question concerned felony convictions, and the trial court noted that he had "allowed you [the defense] to go into the—by prior ruling—to the leaving the scene of an accident, but I do not think that that opened it up to any other misdemeanor arrest and so forth and so on." Defense counsel responded:

> "We did not go into it. This is their question. The prosecution asked this question; we did not ask this question. We did not ask the question, and we think it's part of her constitutional rights, on her right of confrontation, her right of due process under protection of law to be able to go into the subject which the prosecution has raised, particularly on a key witness like this."

Moreover, the defense counsel was allowed to argue during his closing argument that the witness's involvement in the crime, arrest under suspicion of the charges, and prior convictions all tended to prove his bias and self-interest in testifying for the State.

> "'"The scope of cross-examination in a criminal proceeding is within the discretion of the trial judge and it is not reviewable except for the trial judge's prejudicial abuse of discretion. *Jackson v. State*, Ala.Cr.App., 353 So.2d 40, cert. denied, 353 So.2d 48 (1977). *McFerrin v. State*, Ala.Cr.App., 339 So.2d 127 (1976). The right to a thorough and sifting cross-examination of a witness does not extend to matters that are collateral or immaterial and the trial judge is within his discretion in limiting questions which are of that nature. *McLaren v. State*, Ala.Cr.App., 353 So.2d 24, cert. denied, 353 So.2d 35 (1977); *McDonald v. State*, Ala.Cr.App., 340 So.2d 103 (1976)."
>
> "'See also *Burton v. State*, 487 So.2d 951 (Ala.Cr.App.1984). While rather wide latitude is allowed on cross-examination, the court has reasonable discretion in confining the examination to prevent diversion to outside issues.'"

Steeley v. State, 622 So.2d 421 (Ala.Cr.App. 1992), quoting *Beavers v. State*, 565 So.2d 688, 690 (Ala.Cr.App.1990).

In *McMillian v. State*, 594 So.2d 1253 (Ala.Cr.App.1991), remanded on other grounds, 594 So.2d 1288 (Ala.1992) this court held that the trial court had not abused its discretion in limiting the defendant's cross-examination of a key State's witness, where the defendant had sought to ask the witness about the following subjects: how long he had spent in prison for a forgery conviction, "an unrelated pending murder case," and when the witness intended to meet with his attorney and enter his guilty plea in the instant case. This court held:

> "These questions sought to elicit collateral and irrelevant matter; therefore, the trial court did not abuse its discretion in sustaining the objections to them. The evidence of [the witness's] criminal record, which was substantial, was before the jury. The jury was made aware that he had been convicted and had served time for burglary, forgery, and theft. The jury was also aware that [the witness] had made a deal with the State to enter a plea of guilty to a lesser charge at a later time in return for his testimony."

McMillian v. State, supra, at 1261–62.

[24] Even if the prosecutor, in fact, "opened the door" to the appellant's questions concerning these unrelated charges and convictions against the witness, and even in light of the witness's key role as one of the two main nonaccomplice witnesses against the appellant, any error in limiting this cross-examination was harmless.

> "'[A] party is given wide latitude on cross-examination to test a witness's partiality, bias, or interest.' *Perry v. Brakefield*, 534 So.2d 602, 608 (Ala.1988). The rule in this state, notwithstanding the general principle concerning the development of the interest or bias of a witness, is that the range of cross-examination rests largely in the discretion of the trial court and that the court's rulings will not be disturbed unless it clearly appears that the defendant was prejudiced by the rulings. However, 'where the witness' testimony is important to determination of the issues being tried, there is little, if any, discretion in the trial judge to disallow cross-examination on matters which tend to indicate the bias of the witness.' *Wells v. State*, 292 Ala. 256, 258, 292 So.2d 471, 473 (1973).
>
> "... '"[T]he extent to which a witness may properly be cross-examined as to collateral circumstances for the purpose of showing bias depends in some instances upon the *importance of his testimony*, and especially upon whether such testimony is of a nature to be seriously affected by prejudice, bias, or hostility."' *Louisville & N.R. v. Martin*, 240 Ala. 124, 131, 198 So. 141, 147 (1940) (emphasis in original). '[I]t is an abuse of discretion and a violation of constitutional rights to deny to a defendant the right to cross-examine a witness at all on a "subject matter relevant to the witness's credibility," such as the witness's possible motive for testifying falsely.' *United States v. Brown*, 546 F.2d 166, 169 (5th Cir.1977)....
>
> "....
>
> "Although we are extremely reluctant to hold that any improper limitation of cross-examination constitutes harmless error, we are convinced beyond any reasonable doubt that the error in this case did not contribute to the verdict of the jury. See *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Violations of the confrontation clause of the Sixth Amendment are subject to harmless error analysis. *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).
>
> "'[W]e hold that the constitutionally improper denial of the defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to *Chapman* [*v. California*, 386 U.S. 18, 87 S.Ct. 824], harmless-error analysis. The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.'
>
> "*Van Arsdall*, 475 U.S. at 684, 106 S.Ct. at 1438."

Hooper v. State, 585 So.2d 142, 145–46 (Ala. Cr.App.1991), cert. denied, — U.S. —, 112 S.Ct. 1295, 117 L.Ed.2d 517 (1992).

In the present case, in light of the overall strength of the prosecution's case, any error by the trial court in limiting this cross-examination was harmless because the witness admitted that he had been in trouble with the law and that he had a criminal record; and the appellant was allowed to cross-examine the witness concerning his previous conviction, which was pending at the time of his questioning.

XIII

[25] The appellant argues that the State introduced and relied on prejudicial evidence of the appellant's bad character in order to obtain a conviction against her. Specifically, the appellant refers to evidence that she, a married woman, was having an affair with codefendant Lorenzo McCarter. The appellant argues that the probative value of this evidence was greatly outweighed by its prejudicial effect. However, it is clear from the record and from the evidence introduced at trial that the appellant's relationship with Lorenzo McCarter was the cornerstone of the conspiracy and established the motive for the murder.

> "In cases based largely on circumstantial evidence, a rather wide range of evidence is allowed in developing circumstances tending to show motive on the part of the accused. *Turner v. State*, 224 Ala. 5, 140 So. 447 (1931); *Chambliss v. State*, 373 So.2d 1185 (Ala.Cr.App.), *cert. denied*, 373 So.2d 1211 (Ala.1979). Where the evidence is in conflict as to whether the accused did the act, or is partially or wholly circumstantial upon that issue, the question of motive becomes a leading inquiry. *Harden v. State*, 211 Ala. 656, 101 So. 442

(1924). While not alone sufficient to justify a conviction, motive may strengthen circumstantial evidence. *Dolvin v. State*, 391 So.2d 666 (Ala.Cr.App.1979), *affirmed*, 391 So.2d 677 (Ala.1980). Evidence of a particular relationship between the accused and another person, when combined with other factors, may be relevant in proving motive and therefore be admissible. *Turner, supra*.

"As our Supreme Court stated in *McDonald v. State*, 241 Ala. 172, 174, 1 So.2d 658 (1941): '*Testimony going to show motive*, though motive is not an element of the burden of proof resting on the State, *is always admissible*.' (Emphasis added.) And as we held in *Baalam v. State*, 17 Ala. 451, 453 (1850), 'When it is shown that a crime has been committed and the circumstances point to the accused as the guilty agent, then proof of a motive to commit the offense, though weak and inconclusive evidence, is nevertheless admissible.' See also *McClendon v. State*, 243 Ala. 218, 8 So.2d 883 (1942); *Spicer v. State*, 188 Ala. 9, 65 So. 972 (1914). Even slight evidence to show a motive for doing the act in a criminal case is not to be excluded, but should be left to the consideration of the jury. *Arnold v. State*, 18 Ala.App. 453, 93 So. 83 (1922).

"Further in *Earnest v. State*, 21 Ala. App. 534, 536, 109 So. 613 (1926), the court held the following:

> "'[I]t is permissible in every criminal case to show that there was an influence, an inducement, operating on the accused, which may have led or tempted him to commit the offense. It may spring from the lust of gain, or the gratification of an unlawful passion, from animosity, ill will, hatred, or revenge. The extent or magnitude of such motive, whether great or small, is also a proper inquiry . . . .'"

Kelley v. State, 409 So.2d 909, 913–14 (Ala. Cr.App.1981) (wherein testimony of the defendant's involvement with a female employee was properly admitted as tending to show motive in a case of embezzlement).

Thus, in the present case, the evidence concerning the appellant's extramarital affair with one of her codefendants was relevant as evidence toward establishing the conspiracy and the motive for the murder.

XIV

[26] The appellant argues that her rights under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and her rights under the Alabama constitution, were violated by the introduction of prejudicial and gruesome photographs of the deceased.

> "As a general rule, photographs are admissible in evidence if they tend to prove or disprove some disputed or material issue, to illustrate or elucidate some other relevant fact or evidence, or to corroborate or disprove some other evidence offered or to be offered, and their admission is within the sound discretion of the trial judge. Photographs which depict the character and location of external wounds on the body of a deceased are admissible even though they are cumulative and based upon undisputed matters. The fact that a photograph is gruesome and ghastly is no reason to exclude its admission into evidence, if it has some relevancy to the proceedings, even if the photographs may tend to inflame the jury."

Magwood v. State, 494 So.2d 124, 141 (Ala. Cr.App.1985), affirmed, 494 So.2d 154 (Ala. 1986) (citations omitted).

In the present case, the photographs corroborated certain State's evidence and illustrated certain witnesses' testimony. Moreover, the photographs served to prove the victim's identity, show the nature and extent of his wounds, depict the condition of the scene where the body was found, and depicted the condition and existence of certain items of evidence, as well as their location. We find no abuse of discretion by the trial court in the admission of these photographs. *Grice v. State*, 527 So.2d 784 (Ala.Cr.App. 1988).

XV

[27] The appellant further argues that the State introduced photographs of the victim, while he was still alive, in order to obtain a verdict and sentence based on passion and prejudice, in violation of her rights to a fair trial and sentencing. She argues that the photographs of the victim while he was alive were irrelevant to any issue before the jury and introduced solely to inflame the jury. The single picture of the victim, prior to his murder, was relevant as it tended to identify the victim, especially in light of the condition of the victim's face after having been shot. As such, the introduction of this photograph during the guilt phase was not an Eighth Amendment violation. See *Willis v. Kemp*, 838 F.2d 1510, 1521 (11th Cir.1988), cert. denied, 489 U.S. 1059, 109 S.Ct. 1328, 103 L.Ed.2d 596 (1989).

[28] Moreover, the introduction of this photograph during the sentencing phase was not error. "It is not necessary that the sentencing decision be made in the context in which the victim is a mere abstraction." *Brooks v. Kemp*, 762 F.2d 1383, 1409 (11th Cir.1985) (en banc), vacated, 478 U.S. 1016, 106 S.Ct. 3325, 92 L.Ed.2d 732 (1986).

XVI

The appellant argues that she was denied a fundamentally fair trial and sentencing, due to several instances of prosecutorial misconduct. Those prosecutorial comments made during the guilt phase will be addressed under subheading "A" and those prosecutorial comments made during the sentencing phase will be addressed under subheading B.

A

The appellant cites a number of comments made by the prosecutor during closing argument which she alleges were so prejudicial as to mandate reversal. Only two of these instances were objected to; the remaining are raised for the first time on appeal, and, therefore, must be analyzed under the "plain error" rule. Rule 45A, A.R.App.P. The objected-to comments concern the prosecutor's reference to "open file discovery," and her comment that the testimony of State's witness Trimble and that of State's witness McCarter matched.

[29] The comment made by the prosecutor concerning the State's open file discovery was as follows:

> "You saw her [the appellant's] testimony, and you saw she had her story down pretty good. She's had what, eighteen months, eighteen months since she started planning this. Fourteen-sixteen months since she's been arrested. She's had nothing to do but get her story straight, with the advantage of having every piece of evidence the State had through its resources, she had. So you see, she had our resources, too, didn't she?—and the advantage of being able to concoct her story to fit as best it could. The State has—
>
> "[DEFENSE COUNSEL]: Objection, Your Honor. That's not the evidence and—it's not a legitimate inference from the evidence.
>
> "THE COURT: Let's move on. It's argument."

Prior to this comment, during defense counsel's closing argument, the following transpired:

> "And how do you prove your innocence? Now remember, when you think about that, think of all the resources of the State. You've got Investigators, Sheriff's Department, you've got the Police Department, you've got numerous resources to gather evidence. Think about all those resources being focused on one little Louise Harris. Think about the overwhelming burden that is to one little individual with limited resources. Think about your friend or whoever was charged with that type offense. Have some compassion for them."

The State's reference to the fact that the appellant had access to all of the State's evidence was a proper reply in kind to the appellant's argument that she had very limited resources, as opposed to those of the State. See *Kuenzel v. State*, 577 So.2d 474, 503 (Ala.Cr.App.1990), affirmed, 577 So.2d 531 (Ala.1991), cert. denied, — U.S. —, 112 S.Ct. 242, 116 L.Ed.2d 197 (1991), citing *Ex parte Rutledge*, 482 So.2d 1262, 1264 (Ala. 1984). See also *Salter v. State*, 578 So.2d 1092 (Ala.Cr.App.1990), cert. denied, 578 So.2d 1097 (Ala.1991); *Smith v. State*, 588 So.2d 561, 572 (Ala.Cr.App.1991).

Moreover, even if this comment could be considered error as a comment on matters not in evidence, the comment would constitute harmless error. See *Kuenzel v. State*, 577 So.2d 474, 493 (Ala.Cr.App.1990). Cf. *Chatom v. State*, 591 So.2d 101 (Ala.Cr.App. 1991).

[30] The comment by the prosecutor that the two State's witnesses, Trimble and McCarter, gave testimony that "matched" is a proper inference from the evidence, as these witnesses did not contradict each other, during their testimony, in any significant regard.

"Although counsel has 'no right to create evidence by his argument,' *Davis v. State*, 49 Ala.App. 587, 590, 274 So.2d 360, 363 (1972), cert. denied, 290 Ala. 364, 274 So.2d 363 (1973), 'counsel may draw any inference which the facts tend to support.' *Brothers v. State*, 236 Ala. 448, 452, 183 So. 433, 436 (1938). 'Counsel for the State and defendant are allowed a rather wide latitude in drawing their deductions from the evidence.' *Arant v. State*, 232 Ala. 275, 279, 167 So. 540, 543 (1936). 'Counsel has a right to argue any reasonable inference from the evidence or lack of evidence . . . and to draw conclusions from the evidence based on their own reasoning.' *Roberts v. State*, 346 So.2d 473, 476 (Ala.Cr.App.), cert. denied, 346 So.2d 478 (Ala.1977). 'Trial judges ordinarily are loath to limit inferential argument which has any connection with the evidence even though farfetched. . . . So long as counsel does not travel out of his case and confines statements to reasonable inferences deducible from the evidence, he should not be controlled.' *Roberts*, 346 So.2d at 477. '[I]t would be dangerous to accord the presiding judge the right and power to intervene and declare authoritatively when an inference of counsel is or is not legitimately drawn. This is for the jury to determine, if there be any testimony on which to base it.' *Cross v. State*, 68 Ala. 476, 483 (1881)."

Kuenzel v. State, supra at 493–94.

The other prosecutorial comments made during the guilt phase that the appellant alleges are error were not objected to and therefore to be considered on appeal must amount to "plain error," or error that has or probably has "adversely affected the substantial right of the appellant." Rule 45A, A.R.App.P. The appellant refers to 10 allegedly improper comments by the prosecutor during his closing argument in the guilt phase.

[31] The prosecutor's comment that State's witness Patterson had no reason to lie and that State's witness Trimble had nothing to gain were proper inferences from the evidence. The evidence showed that Patterson was not an accomplice to the murder and that Trimble was in no way suspected of being involved. Moreover, there is no evidence of any bargains made in exchange for Trimble's testimony. These comments by the prosecutor were also proper as reply in kind to defense counsel's previous argument that both witnesses were biased and had a motive for testifying for the State.

The appellant also argues that the prosecutor's statement that Lorenzo McCarter would "have his day in court" was not a proper inference from the evidence. However, the record indicates that the agreement made by the State, in order to gain McCarter's testimony, was that the State would not seek the death penalty in McCarter's capital murder trial. There was no evidence that the charges against McCarter would be dropped or that McCarter would plead guilty to the capital offense. Moreover, even if McCarter were to plead guilty, the State would still have to prove his guilt. See § 13A-5-42, *Code of Alabama* 1975.

[32] The prosecutor's reference to the fact that Alex Hood and Michael Sockwell invoked their Fifth Amendment right to remain silent was made pursuant to her explanation of the agreement made by the State to obtain McCarter's testimony. Although the appellant argues that this comment was error under *Ex parte Tomlin*, 540 So.2d 668 (Ala.1988), the present case is readily distinguishable. In *Ex parte Tomlin*, the Alabama Supreme Court held that it was prosecutorial error for the State to repeatedly refer during closing argument to the fact that the defendant's wife could not be called to testify. The Court held that this comment implied

that the defendant's wife was not testifying because she knew something that would implicate her husband. In the present case, the two witnesses took the stand and refused to testify in front of the jury. Moreover, no close relationship exists between these witnesses and the appellant, which would lead to the inference that these witnesses knew that the appellant was guilty and were refusing to testify in order to protect her. More reasonably, these witnesses' refusal to testify would have been a matter of self-protection. Because the jury was well aware of the fact that the two witnesses refused to testify, the prosecutor was merely commenting on the evidence.

[33] The comment by the prosecutor that the appellant moved out of her mother-in-law's house so that she could have the privacy in which to carry on an affair was a reasonable inference from the evidence. There was evidence presented that the appellant was very unhappy with the fact that she was living with the victim's mother, and there was also evidence that the appellant had been involved in other extramarital affairs prior to the one with Lorenzo McCarter.

[34] The prosecutor's comment that the appellant had possibly been drinking or was otherwise intoxicated when she was called concerning the victim's whereabouts on the night of his murder was a proper inference from the evidence. There was testimony that the appellant's speech was slurred and sluggish during the telephone call and, when questioned the witness, who had placed the call, stated that he was uncertain whether this could have been the result of a state of intoxication.

[35] The prosecutor's comment that the appellant was "begging . . . to frame Freddie Patterson" was a proper reply in kind to defense counsel's argument that Patterson was, in fact, an accomplice and should have been charged in the present case.

[36] The prosecutor's comment that the appellant wanted the victim killed by Friday because of a car loan was also a proper inference from the evidence. Trimble testified that the appellant had stated she wanted the victim killed by Friday because he was dipping into his insurance policies in order to build an addition onto their house. There was also testimony that the appellant knew that her husband was in the process of purchasing an automobile for her daughter. The prosecutor further stated that the car loan did not "come through" as a reply in kind to defense counsel's argument during his closing statement, wherein he stated:

> "Look at this loan application that they've made a big to-do over. Take this back and look at it. Sergeant Harris was buying a car for Louise's daughter. Eight hundred and fifty dollars. They have been trying to tell you all this time she had to get him killed before he got the eight hundred and fifty dollars. Now this is real important to them. They struggled to get this in. They—you know, they brought witnesses up here and they got it in and here it is. Take this application back and look at it. If you don't know from your own experience, this application is going to tell you. When you go down to get a loan at the Credit Union you have credit life on it, and it's right there—credit life. Now what does that mean? We all know if Sergeant Harris had gotten the eight hundred and fifty dollars and then been killed, the loan would have been paid for and they would have had another car in the family."

The prosecutor's comments that there was no evidence that McCarter had a crimina' conviction and that McCarter had made consistent statements concerning the murder since his arrest were proper inferences from the evidence. The record indicates that there was no evidence before the jury of any convictions, although McCarter had admitted that Harris got him "out" when he had been charged with driving under the influence. Moreover, McCarter's statements had not significantly changed since he had admitted his guilt.

[37] The prosecutor's statement that Trimble did not change his testimony concerning his voice identification of Harris was a proper argument. Although Trimble initially testified that the appellant was not identified as "the voice" on the telephone,

subsequently, during a conference outside the presence of the jury, Trimble testified that he had misunderstood the trial court's initial question concerning the identification. Although an inference could be drawn that the witness intentionally changed his testimony, it is also possible that he misunderstood the question.

" 'Counsel in the trial of any lawsuit has the unbridled right (to be sure, the duty) to argue the reasonable inferences from the evidence most favorable to his client.' *Ex parte Ainsworth*, 501 So.2d 1269, 1270 (Ala.1986) (footnote omitted). '[T]he rule is that counsel are allowed considerable latitude in drawing their deductions from the evidence in argument to the jury.' *Espey v. State*, 270 Ala. 669, 674, 120 So.2d 904, 907 (1960)."

Kuenzel, supra at 492.

[38] Similarly, the prosecutor was merely arguing on behalf of his "client" when he requested that the jurors not consider the lesser-included offense of murder. The prosecutor, as an advocate, has the right to make such arguments to the jury.

B

The appellant cites several allegedly improper comments by the prosecutor during the sentencing hearing before the trial judge, which she argues resulted in a jury verdict override and in imposition of the death sentence, based on improper considerations. The appellant raised no objections to any of the now-cited comments made during the prosecutor's closing argument in this sentencing hearing.

" 'While this failure to object does not preclude review in a capital case, *it does weigh against any claim of prejudice.*' *Ex parte Kennedy*, 472 So.2d [1106] at 1111 (emphasis in original). 'This court has concluded that the failure to object to improper prosecutorial arguments . . . should be weighed as part of our evaluation of the claim on the merits because of the suggestion that the defense did not consider the comments in question to be particularly harmful.' *Johnson v. Wainwright*, 778 F.2d 623, 629 n. 6 (11th Cir.1985), cert. denied, 484 U.S. 872, 108 S.Ct. 201, 98 L.Ed.2d 152 (1987). 'Plain error is error which, when examined in the context of the entire case, is so obvious that failure to notice it would seriously affect the fairness, integrity, and public reputation of the judicial proceedings.' *United States v. Butler*, 792 F.2d 1528, 1535 (11th Cir.), cert. denied, 479 U.S. 933, 107 S.Ct. 407, 93 L.Ed.2d 359 (1986)."

Kuenzel v. State, supra at 489.

[39] The prosecutor commented that the aggravating circumstance that the capital offense was committed for pecuniary gain was established by the jury's verdict of guilt on the capital count. This argument is a correct statement of the law. See *Haney v. State*, 603 So.2d 368 (Ala.Cr.App.1991) ("where a defendant has been convicted of the capital offense of murder for hire, even though that person was the hirer and was convicted of the offense as an accomplice pursuant to the complicity statute, the aggravating circumstance that the capital offense was committed for pecuniary gain is established as a matter of law").

[40] The prosecutor's argument that the trial court should not consider the testimony of the appellant's five character witnesses, because none of them knew of her affair with Lorenzo McCarter was not an improper comment. The evidence indicates that each of the witnesses stated that they were unaware that the appellant was having the extramarital affair with McCarter. "The prosecutor has the right to present his impressions from the evidence. He may argue every matter of legitimate inference and may examine, collate, sift, and treat the evidence in his own way." *Donahoo v. State*, 505 So.2d 1067, 1072 (Ala.Cr.App.1986). Further, the prosecutor's argument to the trial court could be understood as a comment that the witnesses must not have known the appellant very well, if they were unaware of the affair.

Moreover, any inferential argument by the prosecutor that the appellant should be sentenced to death because she was not a good person would be a legitimate argument based on evidence that she hired people to murder her husband for money and to legitimize an extramarital affair.

[41] The next allegation of error by the prosecutor concerned her argument to the trial court that he not consider the credibility of certain State's witnesses, particularly McCarter, in that the jury had already considered that evidence and arrived at a verdict of guilt. Essentially, the prosecutor argued that the trial court not consider the credibility of certain State's witnesses as a nonstatutory mitigating factor. This comment does not violate *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), which held that a trial court must consider such nonstatutory mitigating circumstances as aspects of the defendant's character and background, as well as certain circumstances of the offense. As stated by the United States Supreme Court in *Franklin v. Lynaugh*, 487 U.S. 164, 174, 108 S.Ct. 2320, 2327, 101 L.Ed.2d 155 (1988):

"Our edict that, in a capital case, ' "the sentencer.... [may] not be precluded from considering, as a *mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense," ' *Eddings v. Oklahoma*, 455 U.S. 104, 110, 102 S.Ct. 869, 874, 71 L.Ed.2d 1 (1982) (quoting *Lockett*, 438 U.S., at 604, 98 S.Ct., at 2964), in no way mandates reconsideration by juries, in this sentencing phase, of their 'residual doubts' over a defendant's guilt. Such lingering doubts are not over any aspect of petitioner's 'character,' 'record,' or a 'circumstance of the offense.' This Court's prior decisions, as we understand them, fail to recognize a constitutional right to have such doubts considered as a mitigating factor."

"Our cases do not support the proposition that a defendant who has been found to be guilty of a capital crime beyond a reasonable doubt has a constitutional right to reconsideration by the sentencing body of lingering doubts about his guilt. We have recognized that some states have adopted capital sentencing procedures that permit defendants in some cases to enjoy the benefit of doubts that linger from the guilt phase of the trial, see *Lockhart v. McCree*, 476 U.S. 162, 181, 106 S.Ct. 1758, 1768, 90 L.Ed.2d 137 (1986), but we have never indicated that the Eighth Amendment requires states to adopt such procedures. To the contrary, as the plurality points out, we have approved capital sentencing procedures that preclude consideration by the sentencing body of 'residual doubts' about guilt. See *Ante*, [487 U.S. at 173 n. 6, 108 S.Ct.], at 2327, n. 6."

"Our decisions mandating jury consideration of mitigating circumstances provide no support for petitioner's claim because 'residual doubt' about guilt is not a mitigating circumstance. We have defined mitigating circumstances as facts about the defendant's character or background, or the circumstances of the particular offense, that may call for a penalty less than death. [citations omitted]. 'Residual doubt' is not a factor about the defendant or the circumstances of the crime. It is instead a lingering uncertainty about facts, a state of mind that exists somewhere between 'beyond a reasonable doubt' and 'absolute certainty.' "

Id., at 187–88, 108 S.Ct. at 2334–35.[4]

[42] The appellant argues that the prosecutor improperly urged the trial court to disregard the jury's verdict. However, the record indicates that the prosecutor stated, "[T]he Court should consider the jury's verdict"; however, she urged the trial court to override the jury's recommended sentence because, she argued, it was based on emotion rather than on evidence. The prosecutor may formulate reasonable arguments from the evidence. Emotion, sympathy, and passion are not proper sentencing considerations. See *Beck v. State*, 396 So.2d 645, 663 (Ala.1980). Moreover, a jury verdict override is permitted in Alabama by § 13A–5–47(e), *Code of Alabama* 1975, and such a statute has been held constitutional. See *Proffitt v. Florida*, 428 U.S. 242, 252, 96 S.Ct. 2960, 2966, 49 L.Ed.2d 913 (1976).

[43] The appellant argues that the prosecutor improperly argued that the appellant should be sentenced to death because she

4. This latter quote is taken from Justice O'Connor's concurring opinion, which was joined in by Justice Blackmun.

had not been "battered" by the victim and therefore the fact that she had been abused could not be considered as a nonstatutory mitigating circumstance. However, the prosecutor's comment referred to the fact that the appellant's motive was strictly money or legitimization of an extramarital affair, rather than because she had been abused by the victim. The record indicates that evidence had been introduced during the guilt phase of the trial that the appellant was battered and abused by the victim. The prosecutor's comment was proper argument against a nonstatutory mitigating circumstance that could have been considered by the trial court; i.e., because the appellant's background is a proper consideration under *Lockett v. Ohio*, supra, the fact that she had or had not been battered by her husband could have been considered by the trial court in sentencing.

[44] The appellant also argues that the prosecutor improperly commented on the appellant's lack of remorse. However, this comment was a proper inference from the evidence, because testimony had been introduced at trial that the appellant's reaction to being informed of her husband's death was so unemotional that she was questioned concerning her reaction. Her response was that she and the victim had suffered marital problems.

[45] The appellant argues that the prosecutor improperly referred to her father's death, which was irrelevant to the instant case, and inferred that he was killed in the same manner as the victim in the present case. The following occurred during the closing arguments by the prosecutor:

"[PROSECUTOR]: The Court had asked earlier about the testimony about her father dying and the circumstances surrounding that. We would refer the Court to the notes and, of course, the transcript is not ready, but the Court might could take its mind back to the testimony of Dorinda Hinton, the Sheriff's Investigator. Just before cross-examination, Investigator Hinton told the jury and the Court about her conversations with the defendant, and in addition to the comments about McCarter was a wonderful lover, she was asked and talked about what she said about her father. And Hinton testified before this Court, that this defendant, the night he was killed and she was informed of it, said my father was killed just like that. And, of course, our facts are the Deputy Sheriff is killed in an ambush by a shotgun. Not only that, but I believe the testimony will show that when this defendant testified she was asked on cross-examination if she said that and if it were true and I believe the record would show that she did say that. So that's the basis, from our perspective, of where that evidence came from. Certainly we are not asking this Court to find her guilty of her father's death, that's not why it was brought out, but to show her mental state, her emotional state at the time she was informed of his death."

The record indicates that during the course of the trial, State's witness Dorinda Hinton testified that, after being told of her husband's death, the appellant stated to Hinton that her father had been killed like the victim. Subsequently, during defense counsel's direct examination, the appellant testified that she was in her "20's" when her father died by gunshot. Thus, the prosecutor's argument was a correct comment on the evidence. Moreover, although the reference to this evidence may have unduly prejudiced the appellant, any error did not rise to the level of "plain error." "'Plain error is error which, when examined in the context of the entire case, is so obvious that failure to notice it would seriously affect the fairness, integrity, and public reputation of the judicial proceedings.'" *Kuenzel v. State*, supra, at 489, quoting *United States v. Butler*, 792 F.2d 1528, 1535 (11th Cir.), cert. denied, 479 U.S. 933, 107 S.Ct. 407, 93 L.Ed.2d 359 (1986).

XVII

The appellant argues that the State failed to establish sufficient evidence to sustain her conviction of capital murder and her sentence of death. Specifically, the appellant argues that the State failed to satisfy its burdens in two respects: the State, she argues, failed to provide sufficient corroboration of accomplice testimony, and failed to prove that the murder was committed for pecuniary gain.

[46] The record indicates that neither Patterson nor Trimble were accomplices. In the present case the question of complicity constituted a question of fact for the jury to decide and, by its verdict, it is clear that it found sufficient corroboration of accomplice testimony. Patterson was present with the majority of the coconspirators during the commission of the offense. He testified to a female voice broadcasting over McCarter's beeper the message "He is leaving." Trimble testified that he was solicited by the appellant to commit the offense. Moreover, she was implicated by her conduct upon learning of her husband's death and by her statement that, if McCarter committed the offense, she did not tell him to do so. Moreover, she admitted to her affair with McCarter and to having had marital problems with the victim.

> "A conviction of felony cannot be had on the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with such commission of the offense, and such corroborative evidence, if it merely shows the commission of the offense or the circumstances thereof, is not sufficient."

§ 12-21-222, *Code of Alabama* 1975. The State presented corroborative evidence to connect the appellant with the commission of the offense.

[47] Furthermore, the State presented sufficient evidence to support the pecuniary gain element of the capital charge. Trimble testified that the appellant told him on the telephone that the murder should be committed by Friday to prevent the victim from spending the insurance money. McCarter testified that the appellant provided $100 initially to pay Sockwell and Hood to commit the murder, with the promise of more when the appellant collected the insurance money.

Moreover, the State also provided sufficient evidence that the appellant hired Sockwell and Hood to murder her husband. Thus, under both theories, the State presented sufficient evidence to support the conviction and the aggravating circumstance of murder for pecuniary gain.

XVIII

The appellant argues that the trial court's instructions during the guilt phase of her trial, violated the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 1, 6, and 15 of the Constitution of Alabama. The record indicates that the appellant failed to object to any of these allegations of error and, therefore, these instances must be analyzed pursuant to the "plain error" doctrine.

[48] The appellant argues that the trial court failed to instruct the jury that the State was required to prove that she knew about her husband's insurance and retirement benefits before she could be found guilty of committing murder for pecuniary gain. The record indicates that the trial court charged the jury that it must be convinced that the appellant committed the intentional murder and that the murder was committed for a pecuniary gain or pursuant to a contract for hire. This language substantially tracks the language of § 13A-5-40(a)(7), *Code of Alabama* 1975. "A charge which tracks the identical language of the statute is proper. *Jordan v. State*, 17 Ala.App. 575, 87 So. 433, cert. denied, 205 Ala. 114, 87 So. 434 (1920)." *King v. State*, 595 So.2d 539 (Ala.Cr.App. 1991). Moreover, charges which track the language of a Code section are sufficient. See generally *Salter v. State*, 578 So.2d 1092, 1096 (Ala.Cr.App.1990), writ denied, 578 So.2d 1097 (Ala.1991).

Although the appellant argues that the trial court did not adequately instruct the jury on the lesser-included offense of murder, a review of the trial court's entire charge reveals that the appellant's argument is without merit. The trial court instructed the jury on intentional murder, as a separate offense, and emphasized the distinction between the two offenses. *Ex parte Kennedy*, 472 So.2d 1106 (Ala.1985), cert. denied, 474 U.S. 975, 106 S.Ct. 340, 88 L.Ed.2d 325 (1985).

[49] Although the appellant argues that the trial court erred in failing to charge the

jury on the lesser-included offense of reckless murder, clearly the evidence would not have supported such a charge. Reckless murder requires conduct that creates a great risk of death to human life in general. *Fisher v. State*, 587 So.2d 1027 (Ala.Cr.App.1991), cert. denied, — U.S. —, 112 S.Ct. 1486, 117 L.Ed.2d 628 (1992). The evidence presented in the present case shows that the murder was committed after laying in wait for and ambushing Isaiah Harris. Therefore, a charge on universal malice or reckless murder would have been improper.

The appellant claims that the trial court failed to instruct the jury that a particularized intent to kill must be proved beyond a reasonable doubt. However, a review of the trial court's entire charge reveals that the jury was charged as to the requisite particularized intent to kill. Similarly, although the appellant argues that the trial court's instruction on corroboration of accomplice testimony was insufficient, a review of the charge establishes that the appellant's claim is without merit.

The other claimed errors by the appellant in the trial court's oral charge to the jury, are either legally incorrect [5] or do not constitute plain error.[6]

XIX

The appellant contends that the trial court's imposition of the death sentence, after the jury returned a verdict of life imprisonment without parole, violated her constitutional rights. Generally, the appellant argues that the trial court's override of the jury's recommended verdict was standardless and arbitrary. However, the constitutionality of Alabama's statutory sentencing scheme was approved by the United States Supreme Court in *Proffitt v. Florida*, 428 U.S. 242, 252, 96 S.Ct. 2960, 2966, 49 L.Ed.2d 913 (1976), and the jury verdict override provisions were specifically found constitutional in *Spaziano v. Florida*, 468 U.S. 447, 457–67, 104 S.Ct. 3154, 3160–66, 82 L.Ed.2d 340 (1984). Pursuant to § 13A–5–47(e), *Code of Alabama* 1975, "[t]he trial court and not the jury is the sentencing authority". *Freeman v. State*, 555 So.2d 196, 213 (Ala.Cr.App. 1988), affirmed, 555 So.2d 215 (Ala.1989), cert. denied, 496 U.S. 912, 110 S.Ct. 2604, 110 L.Ed.2d 284 (1990). "The trial court is authorized to reject the jury's recommendation of life without parole when imposing sentence and to impose a death sentence." *Id.* See also *Tarver v. State*, 500 So.2d 1232, 1251 (Ala.Cr.App.), affirmed, 500 So.2d 1256 (Ala. 1986), cert. denied, 482 U.S. 920, 107 S.Ct. 3197, 96 L.Ed.2d 685 (1987); *Thompson v. State*, 542 So.2d 1286, 1300 (Ala.Cr.App. 1988), affirmed, 542 So.2d 1300 (Ala.1989), cert. denied, 493 U.S. 874, 110 S.Ct. 208, 107 L.Ed.2d 161 (1989).

Although the appellant argues that the jury verdict override standards adopted by Florida in *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975) are constitutionally required, this court has previously rejected that argument. See *White v. State*, 587 So.2d 1218 (Ala.Cr. App.1990), affirmed, 587 So.2d 1236 (Ala. 1991), cert. denied, — U.S. —, 112 S.Ct. 979, 117 L.Ed.2d 142 (1992), citing *Ex parte Jones*, 456 So.2d 380, 381–82 (Ala.1984), cert. denied, 470 U.S. 1062, 105 S.Ct. 1779, 84 L.Ed.2d 838 (1985). See also *Hadley v. State*, 575 So.2d 145 (Ala.Cr.App.1990).

Moreover, the appellant claims that the trial court's override of the jury's recommendation of a sentence of life without parole was fundamentally unfair in the present case for a number of reasons: because it considered allegedly inadmissible evidence, specifically a presentence report and statements of the appellant's codefendants; because the prosecutor's argument at the sentence hearing was allegedly improper; because the trial court based its death sentence on the aggravating circumstance of pecuniary gain for which there was insufficient evidence; because the trial court failed to weigh the mitigating circumstance that the appellant had no significant history of prior criminal activity; and because the trial court allegedly failed to consider the jury's recommended verdict of life without parole. Because this court has previously held in this opinion that there was sufficient evidence presented by the State to support the aggravating circumstance of pecuniary gain and that the prosecutor's argument during the sentencing hearing was proper, these claims will not be discussed.

[50] Moreover, this court has previously held that presentence reports are admissible evidence, which may be considered by a trial court in sentencing a defendant to death, provided the information contained therein is relevant to sentencing and the defendant has an opportunity to rebut this evidence. See *Thompson v. State*, 503 So.2d 871, 880–881 (Ala.Cr.App.1986), affirmed, 503 So.2d 887 (Ala.), cert. denied, 484 U.S. 872, 108 S.Ct. 204, 98 L.Ed.2d 155 (1987).

> "It is clear to this Court that the use of the presentencing report is consistent with Ala. Code 1975, § 13A–5–45(d), Alabama's capital murder statute which states:
>
> "'Any evidence which has probative value and is relevant to sentence shall be received at the sentence hearing regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of Alabama.'
>
> "The entire report itself is an out-of-court statement and is entirely hearsay; however, it is admissible under the Ala. Code 1975, § 13A–5–47. *Thompson v. State*, supra. The trial court is not obligated to do more than provide a fair opportunity for rebuttal; where the record indicates that the defendant was given sufficient opportunity to rebut any hearsay statements made at the sentencing hearing, there is no error. *Johnson v. State*, 399 So.2d 859 (Ala.Crim.App.1979), *aff'd in part and rev'd on other grounds*, 399 So.2d 873 (Ala.1979)."

Ex parte Davis, 569 So.2d 738, 741 (Ala. 1990), cert. denied, 498 U.S. 1127, 111 S.Ct. 1091, 112 L.Ed.2d 1196 (1991). In the present case, the appellant was provided a copy of the presentence report and was provided the opportunity rebut the statements in the report, and in fact did so.

[51] Furthermore, the statements by the codefendants were admissible, because they were relevant to sentencing and had probative value. Additionally, the record indicates that the appellant requested the trial court to consider one of her codefendant's statements; therefore, any alleged error would have been invited. *Gibson v. State*, 555 So.2d 784, 797 (Ala.Cr.App.1989). For a full discussion of this issue see Part XX, infra.

The record indicates in the trial court's written sentencing order that the trial judge in fact found the existence of the mitigating circumstance that the appellant had no prior criminal history. In the sentencing order the trial court stated:

> "In weighing the aggravating and mitigating circumstances, the Court is aware of the nature of the process as defined in Section 13A–5–48. It is not a matter the Court takes lightly. After carefully considering the matter, the Court is convinced that the one statutory aggravating circumstance found and considered far outweighs all of the non-statutory mitigating circumstances, and that the sentence ought to be death."

It is this statement by the trial court that it weighed all of the nonstatutory mitigating circumstances without referring any statutory mitigating circumstances on which the appellant bases her claim. However, in its sentencing order the trial court also stated that: "Section 13A–5–51(1) mitigating circumstance is present. The defendant has no criminal history." Moreover, following this hearing, a hearing was held on the State's motion, filed pursuant to Rule 10(f), A.R.App.

5. For example, the appellant argues that the trial court's instruction about promises received by McCarter was misleading, because it suggested that the promise that the State would not seek the death penalty was not binding because the court was not a party.

6. The appellant cites as error the trial court's failure to define the term "a crime of moral turpitude." Moreover, the appellant cites as error the trial court's reference during his oral charge to the "State of Alabama, figuratively, the people of this community [who] come into this courtroom by and through their representatives from the District Attorney's Office." However, a review of the context of this language clearly demonstrates that the trial court was instructing the jury on the importance of its role in the judicial system.

P., during which the trial court indicated that it had considered this statutory mitigating circumstance. Because the sentencing order clearly states that the trial court found the existence of this mitigating circumstance and that it weighed the aggravating circumstance against the statutory and nonstatutory mitigating circumstances, as required by § 13A-5-48, *Code of Alabama* 1975, we find no error in the instant case.

Finally, the sentencing order clearly indicates that the trial court also considered the jury's advisory verdict. The jury recommended a sentence of life without parole by a vote of seven to five. There is no indication in the record that the trial court failed to consider this advisory sentence.

XX

The appellant argues that the trial court erroneously considered statements made by codefendants Sockwell and Hood during the sentencing hearing at which the jury's advisory verdict was overridden. The appellant bases this claim on the grounds that she was not given an opportunity to cross-examine these codefendants or to challenge the reliability of their confessions. No objections were raised by the appellant on these grounds during the sentencing hearing, thus any claimed error must rise to the level of plain error. Rule 45A, A.R.App.P. This failure to object weighs against any claim of prejudice. *Ex parte Womack*, 435 So.2d 766, 769 (Ala.), cert. denied, 464 U.S. 986, 104 S.Ct. 436, 78 L.Ed.2d 367 (1983). Moreover, the record indicates that it was the appellant who requested that one of the codefendant's statements be considered.

During the sentencing hearing, defense counsel stated as follows:

"Your Honor, we have reviewed the report of the sentencing department that you've ordered and we have some objections to the report. I guess we should address those right now. In regard—we do not have an objection to the conclusion reached in the recommendation of life without parole but in case the Court is to rely on the report, we object to that part of the report, whereby the presentencing department has stated that Louise Harris was identified by all of the co-defendants as having planned the murder. We would submit the statement or request that the statement of Alex Hood be entered and we say that that does not support it by the evidence."

Thereafter, in examining the parole officer who prepared the presentence report, defense counsel elicited testimony that the officer had not considered the entire statements of the co-defendants, concluding that the evidence the officer had reviewed was an investigative report prepared by the police department. Thereafter, during the prosecutor's examination of this witness, he was asked if he had read the statements of McCarter, Hood, or Sockwell. He responded that he had not read their specific statements. The trial court then stated as follows:

"THE COURT: Let me interrupt for a minute. Did I not request this morning that you go get those statements? I want everybody to know this.

"THE WITNESS: Yes, sir.

"THE COURT: And I now have 'em, but I have not had an opportunity to read 'em since they weren't attached to the report. But for the record's sake and for this, I have requested those question and answer statements to be made a part of this report.

"[PROSECUTOR]: State has no objection and would join in the motion of the defense as to Mr. Hood's, and we would also request the Court to consider the other two.

"THE COURT: Well, I've requested all three."

[52] "An accused cannot by his own voluntary conduct invite error and then seek to profit thereby." *Spears v. State*, 428 So.2d 174, 179 (Ala.Cr.App.1982). "The invited error rule has been applied equally in both capital cases and noncapital cases." *Rogers v. State*, 630 So.2d 78 (Ala.Cr.App.1991), reversed on other grounds, 630 So.2d 88 (Ala. 1992).

[53, 54] The appellant sought to introduce these statements by the codefendants in order to rebut the claim in the presentence investigation report that the accomplices identified her as having participated in the murder. Therefore, the codefendants' statements were relevant. Moreover, hearsay evidence, such as these statements, may be introduced and considered during the sentencing stage of the capital murder trial. See *Henderson v. State*, 583 So.2d 276 (Ala.Cr.App.1990), affirmed, 583 So.2d 305 (Ala. 1991), cert. denied, — U.S. —, 112 S.Ct. 1268, 117 L.Ed.2d 496 (1992). See also § 13A-5-45(d) and (e), *Code of Alabama* 1975. Thus, because this evidence was relevant and because its introduction was requested by the appellant, admitting these statements did not constitute plain error.

XXI

[55] The appellant argues that her sentence of death cannot stand because it was based on one aggravating circumstance, which she claims was inapplicable in her case. The appellant argues that the State failed to prove either that Sockwell and Hood were paid for the killing, or that the appellant would gain the insurance money and other benefits paid upon her husband's death. However, the record indicates that the State clearly proved the aggravating circumstance pursuant to both of these theories. The evidence established the pecuniary gain aggravating circumstance by showing that the appellant paid Hood and Sockwell each $50 for committing the offense. The pecuniary gain "aggravating circumstance should be considered as established where the defendant is convicted of the capital offense as an accomplice-hirer." *Haney v. State*, 603 So.2d 368 (Ala.Cr.App.1991).

Furthermore, the State presented sufficient evidence to support the theory that the appellant had had her husband murdered in order to secure his insurance proceeds as well as other benefits. As previously discussed, McCarter testified that the appellant was aware of these benefits and that she wanted her husband killed in order to obtain them; McCarter further testified that Sockwell and Hood were paid $50 each and were promised more when the appellant secured these monies; Trimble testified that the appellant wanted her husband murdered before he borrowed against too much of his insurance money; and the appellant admitted that she was familiar with her husband's paycheck and the fact that certain monies were withheld from it to provide for certain benefits. Thus, the State provided sufficient evidence of this aggravating circumstance.

XXII

[56] The appellant argues that her sentence of death is disproportionate to sentences imposed on similar defendants under similar circumstances. Specifically, she refers to the fact that Lorenzo McCarter did not receive the death sentence and that other cases exist, involving similar crimes, in which defendants did not receive a sentence of death.

It is clear that, upon her conviction for murder for pecuniary gain, the appellant was eligible for a sentence of death. § 13A-5-51(7), *Code of Alabama* 1975. Moreover, similar penalties have been imposed in similar cases. See *Williams v. State*, 461 So.2d 834 (Ala.Cr.App.1983), reversed on other grounds, 461 So.2d 852 (Ala.1984); *Haney v. State*, supra; *Heath v. State*, 455 So.2d 898 (Ala.Cr.App.1983), affirmed, 455 So.2d 905 (Ala.1984), affirmed, 474 U.S. 82, 106 S.Ct. 433, 88 L.Ed.2d 387 (1985). Under the facts of this case, the appellant's sentence is proportionate to her crime and to sentences imposed in similar cases.

Lorenzo McCarter received a sentence of life without parole, after the State agreed to pursue only a sentence of life without parole, provided that he testify at the appellant's trial. As to the other appellants, Hood, the driver of the automobile, was convicted of the capital offense and was sentenced to life imprisonment without parole. *Hood v. State*, 598 So.2d 1022 (Ala.Cr.App.1991). Sockwell, the triggerman, was convicted of the capital offense and was sentenced to death. His appeal is now pending before this court. Thus, in the present case, the originator of the offense, who persisted and urged its undertaking and who provided the incentives for its completion, received the death sentence. Moreover, she was the victim's wife and, thus, his closest and most trusted relative. The triggerman also received the death sentence. The middleman, who was having an affair with the appellant and who ar-

ranged the liaison between the appellant and the actual murderers, received a sentence of life imprisonment, pursuant to his aid to the State in the case against the appellant. The driver of the automobile also received a sentence of life imprisonment. According to these individual roles in the present offense, we consider the appellant's sentence of death in this case to be proportionate to her accomplices.

XXIII

In accordance with § 13A–5–53, *Code of Alabama* 1975, we have reviewed the record, including the guilt and sentencing proceedings, for any error that adversely affected the rights of the appellant, and we have found none. Nor do we find any evidence that the sentence was imposed under influence of passion, prejudice, or any other arbitrary factor.

The trial court properly found the existence of one aggravating circumstance: that the murder was committed for pecuniary gain. § 13A–5–49(6), *Code of Alabama* 1975. The trial court found the existence of one statutory mitigating circumstance, that the appellant has no criminal history. § 13A–5–51(1), *Code of Alabama* 1975. In his sentencing order, the trial court addressed the statutory mitigating circumstance defined by § 13A–5–51(4), stating that "[w]hile there were others involved and this defendant did not pull the trigger, her participation was such that, but for her, there probably would never have been a killing. She planned it, provided the financing and stood to benefit the most." We find no error in the trial court's holding that this statutory mitigating circumstance was not present in this case. As to the nonstatutory mitigating circumstances, the trial court wrote as follows:

"Defendant's attorneys did a thorough job of presenting non-statutory mitigating circumstance evidence, and this Court has considered all of it.

"The defendant had family and friends who cared about her and had relationships with her which were beneficial to them and her. She was a hard working and respected member of the community. She was a steady worker in her church and community. She was held in high regard by her employers and friends.

"Some of the evidence was circumstantial and included the testimony of individuals with criminal histories and/or a pending charge. Counsel for the defendant did a thorough job in exploring all weaknesses of the State's case, including the credibility of witnesses. This Court has no reason to go behind the guilty verdict of the jury and will not do so. This Court finds the defendant guilty beyond a reasonable doubt. This Court has carefully considered all of the non-statutory mitigating circumstance evidence proffered by the defendant. The Court has also given careful consideration to all of the defendant's contentions concerning non-statutory mitigating circumstances including all of the arguments of her attorneys and the contentions reflected in her proffered jury instruction listing mitigating circumstances. All of the defense's non-statutory mitigating circumstance evidence has been carefully considered. In entering the non-statutory mitigating circumstance findings, and the findings concerning statutory mitigating circumstances, the Court applied the burden of proof set out in Section 13A–5–45(g) and has gone further and resolved every legitimate doubt in the defendant's favor."

The trial court properly considered the nonstatutory mitigating circumstance provided by the appellant.

As to the weighing of these aggravating and mitigating circumstances, the trial court wrote:

"In weighing the aggravating and mitigating circumstances, the Court is aware of the nature of the process as defined in Section 13A–5–48. It is not a matter the Court takes lightly. After carefully considering the matter, the Court is convinced that the one statutory aggravating circumstance found and considered far outweighs all of the non-statutory mitigating circumstances, and that the sentence ought to be death."

After an independent weighing of the aggravating and mitigating circumstances in this case, we find that the evidence supports the trial court's conclusion and indicates that death was the proper sentence. The appellant's statements, actions, role in the offense, and the evidence supporting her guilt, lead us to this conclusion.

The sentence of death in this case is neither excessive nor disproportionate to the penalties imposed in similar cases, considering both the crime and the defendant. See discussion at Issue XXII. Therefore, the appellant's conviction and sentence of death are proper, and the judgment of the circuit court is affirmed.

AFFIRMED.

All the Judges concur, except MONTIEL, J., who dissents with an opinion.

MONTIEL, Judge, dissenting.

Does a defendant in a capital murder case, who is sentenced to death by electrocution, have an absolute right to be present during all pretrial proceedings relating to the case? I believe the answer is yes, because of the guarantees provided by the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fifth Amendment of the United States Constitution.

The majority opinion correctly concludes that the presence of a capital defendant at trial may not be waived by counsel. *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir.1982). The right to participate in the preparation of a defense is a fundamental right afforded to all criminal defendants, especially in those cases in which the charge is punishable by death. The majority, however, ignores this basic right by concluding that "the appellant's presence [at a pretrial hearing] would have been useless to her defense" or that "she was not prejudiced by her absence". I cannot agree that the appellant was not prejudiced by her absence from numerous hearings.

The majority opinion further concludes that the appellant's right to a fair trial was not violated by the appellant's absence from certain pretrial proceedings; however, the record is silent as to which hearings the appellant did not attend. Should a capital defendant's conviction be upheld where the record concerning the basic constitutional issue presented in this case is incomplete? I believe that we must answer this question in the negative. This case should be remanded to the trial court for that court to supplement the record or to conduct a hearing to determine which pretrial hearings the appellant did not attend. Only with a complete record can this court determine with certainty whether the appellant's constitutional rights were violated.

Justice Harlan F. Stone once stated, "[T]he law itself is on trial in every case as well as the cause before it." This case is a trial on a capital defendant's right to be present at pretrial hearings. This court cannot ignore this right because of the difficult cause in which it is presented.

For the foregoing reasons, I respectfully dissent and I would remand this case to the trial court to supplement the record to reflect the appellant's presence at or absence from all pretrial hearings.

Ex parte Louise HARRIS.

(In re Louise Harris

v.

State of Alabama).

1920374.

Supreme Court of Alabama.

June 25, 1993.

On Application for Rehearing
Oct. 29, 1993.

Defendant was convicted in the Circuit Court, Montgomery County, No. CC–88–1237, H. Randall Thomas, J., of capital murder, and she was sentenced to death. The Court of Criminal Appeals affirmed, 632 So.2d 503 and certiorari review was granted. The Supreme Court, Houston, J., held that failure to record and transcribe portion of

"*ATTACHMENT #3*"

ranged the liaison between the appellant and the actual murderers, received a sentence of life imprisonment, pursuant to his aid to the State in the case against the appellant. The driver of the automobile also received a sentence of life imprisonment. According to these individual roles in the present offense, we consider the appellant's sentence of death in this case to be proportionate to her accomplices.

XXIII

In accordance with § 13A-5-53, *Code of Alabama* 1975, we have reviewed the record, including the guilt and sentencing proceedings, for any error that adversely affected the rights of the appellant, and we have found none. Nor do we find any evidence that the sentence was imposed under influence of passion, prejudice, or any other arbitrary factor.

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"Some of the evidence was circumstantial and included the testimony of individuals with criminal histories and/or a pending charge. Counsel for the defendant did a thorough job in exploring all weaknesses of the State's case, including the credibility of witnesses. This Court has no reason to go behind the guilty verdict of the jury and will not do so. This Court finds the defendant guilty beyond a reasonable doubt. This Court has carefully considered all of the non-statutory mitigating circumstance evidence proffered by the defendant. The Court has also given careful consideration to all of the defendant's contentions concerning non-statutory mitigating circumstances including all of the arguments of her attorneys and the contentions reflected in her proffered jury instruction listing mitigating circumstances. All of the defense's non-statutory mitigating circumstance evidence has been carefully considered. In entering the non-statutory mitigating circumstance findings, and the findings concerning statutory mitigating circumstances, the Court applied the burden of proof set out in Section 13A-5-45(g) and has gone further and resolved every legitimate doubt in the defendant's favor."

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AFFIRMED.

All the Judges concur, except MONTIEL, J., who dissents with an opinion.

MONTIEL, Judge, dissenting.

Does a defendant in a capital murder case, who is sentenced to death by electrocution, have an absolute right to be present during all pretrial proceedings relating to the case? I believe the answer is yes, because of the guarantees provided by the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fifth Amendment of the United States Constitution.

The majority opinion correctly concludes that the presence of a capital defendant at trial may not be waived by counsel. *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir.1982). The right to participate in the preparation of a defense is a fundamental right afforded to all criminal defendants, especially in those cases in which the charge is punishable by death. The majority, however, ignores this basic right by concluding that "the appellant's presence [at a pretrial hearing] would have been useless to her defense" or that "she was not prejudiced by her absence". I cannot agree that the appellant was not prejudiced by her absence from numerous hearings.

The majority opinion further concludes that the appellant's right to a fair trial was not violated by the appellant's absence from certain pretrial proceedings; however, the record is silent as to which hearings the appellant did not attend. Should a capital defendant's conviction be upheld where the record concerning the basic constitutional issue presented in this case is incomplete? I believe that we must answer this question in the negative. This case should be remanded to the trial court for that court to supplement the record or to conduct a hearing to determine which pretrial hearings the appellant did not attend. Only with a complete record can this court determine with certainty whether the appellant's constitutional rights were violated.

Justice Harlan F. Stone once stated, "[T]he law itself is on trial in every case as well as the cause before it." This case is a trial on a capital defendant's right to be present at pretrial hearings. This court cannot ignore this right because of the difficult cause in which it is presented.

For the foregoing reasons, I respectfully dissent and I would remand this case to the trial court to supplement the record to reflect the appellant's presence at or absence from all pretrial hearings.

Cite as 632 So.2d 543 (Ala. 1993)

Ex parte Louise HARRIS.

(In re Louise Harris

v.

State of Alabama).

1920374.

Supreme Court of Alabama.

June 25, 1993.

On Application for Rehearing

Oct. 29, 1993.

Defendant was convicted in the Circuit Court, Montgomery County, No. CC-88-1237, H. Randall Thomas, J., of capital murder, and she was sentenced to death. The Court of Criminal Appeals affirmed, 632 So.2d 503 and certiorari review was granted. The Supreme Court, Houston, J., held that failure to record and transcribe portion of

voir dire examination of jury and portions of bench conferences was harmless error.

Affirmed.

Almon, J., concurred in result.

Adams, J., filed dissenting opinion.

Application for rehearing overruled.

1. Criminal Law ⇐643, 1088.1, 1088.8

Failure to record and transcribe portion of voir dire examination of jury and portions of bench conferences amounted to error in capital murder prosecution, where trial court had granted trial counsel's motion to order court reporter to record and transcribe all proceedings in all phases of case.

2. Criminal Law ⇐1166.6, 1166.16

Error in failing to transcribe portion of voir dire examination of jury and portions of bench conferences was harmless, in capital murder prosecution; trial court's rulings relating to some omitted portions of proceedings were adverse to state, and content or substance of other discussions that occurred out of hearing of court reporter was general in nature and had no effect on outcome of case.

Ruth E. Friedman, Atlanta, GA, and Bryan A. Stevenson, Montgomery, for petitioner.

James H. Evans, Atty. Gen., and Sandra J. Stewart, Deputy Atty. Gen., and Robert E. Lusk, Jr., Asst. District Atty., for respondent.

HOUSTON, Justice.

This is a capital murder case. A detailed statement of the facts appears in the opinion of the Court of Criminal Appeals, *Harris v. State*, 632 So.2d 503 (Ala.Cr.App.1992).

Louise Harris was convicted of capital murder; the jury recommended a sentence of life imprisonment without parole. The trial court overrode the jury's recommendation and sentenced Harris to death by electrocution. Judge McMillan, writing for the Court of Criminal Appeals, affirmed Harris's conviction with a lengthy opinion, from which Judge Montiel dissented. The Court of Criminal Appeals overruled Harris's application for rehearing and denied her Rule 39(k), Ala.R.App.P., motion, without opinion. We then granted certiorari review pursuant to Rule 39(c), Ala.R.App.P.

Having carefully read and considered the record, together with Harris's 141-page brief, the state's 237-page brief, and Harris's 18-page reply brief, we conclude that the Court of Criminal Appeals correctly resolved the issues discussed in its opinion. We do note, however, the issue on which Judge Montiel dissents—whether Harris had an absolute right to be present at "all pretrial proceedings relating to [her] case" (i.e., proceedings involving questions of law, questions of procedure, or questions regarding the removal of Harris's counsel), pursuant to the guarantees of the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fifth Amendment of the United States Constitution and because every criminal defendant, particularly a defendant in a capital murder case, has the fundamental right to participate in the preparation of her defense. Suffice it to say, without further discussion, that after thoroughly reviewing the record and the applicable law, we are satisfied that the Court of Criminal Appeals adequately addressed and correctly resolved this issue.

We note also that Harris has raised in this Court several issues that were either not presented to or not addressed by the Court of Criminal Appeals. Because this Court may consider any issue in a capital case concerning the propriety of the conviction and the death sentence, and, more importantly, because a person's life hangs in the balance, we have fully considered each of the additional issues Harris has raised. Furthermore, we have independently searched the record for error, as did the Court of Criminal Appeals. However, after carefully researching the applicable law and after exhaustively scouring the record for error, we find no reversible error in the proceedings below.

[1, 2] We do feel, however, that the following issue, raised by Harris in this Court, warrants further discussion: Whether the absence of a full transcript of the voir dire examination of the jury and all bench conferences denied Harris a fundamentally fair trial in violation of state law and in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and thus constituted reversible error.

Harris bases her argument on Rule 19.4(a), Ala.R.Crim.P., which requires:

> "*In all capital cases* (criminal trials in which the defendant is charged with a death penalty offense), *the court reporter shall take full stenographic notes of voir dire of the jury and of the arguments of counsel*, whether or not such is ordered by the judge or requested by the prosecution or defense. This duty may not be abrogated by the judge or waived by the defendant."

(Emphasis added.) This case was commenced before the adoption of Rule 19.4; therefore, Rule 19.4 is not applicable in this case. Rather, Temporary Rule 21, Ala.Temp.R.Crim.P., governs this case; it read, in part, as follows:

> "(a) *In all capital cases* (criminal cases in which the defendant is charged with a death penalty offense), *the court reporter shall take full stenographic notes of the arguments of counsel* whether or not such is ordered by the judge or requested by the prosecution or defense. This duty may not be abrogated by the judge or waived by the defendant."

(Emphasis added.)

Under Temporary Rule 21(a), there was no requirement that the voir dire examination of the jury be stenographically recorded; and the requirement that the court reporter take "full stenographic notes" of "the arguments of counsel"—which appeared in Temporary Rule 21(a) and also appears in the current Rule 19.4(a)—does not require the court reporter to transcribe every incidental discussion between counsel and the trial judge that occurs at the bench unless counsel so requests or the court so directs. Instead, the phrase "arguments of counsel" refers to opening and closing arguments of counsel. See, e.g., *Ex parte Godbolt*, 546 So.2d 991 (Ala.1987); *Webb v. State*, 539 So.2d 343 (Ala.Crim.App.1987); *Reeves v. State*, 518 So.2d 168 (Ala.Crim.App.1987); see Ala.Code 1975, § 12-17-275.

In this case, the items or statements omitted from the record were not transcribed because they occurred out of the hearing of the court reporter. However, Harris's trial counsel had moved the trial court to "order the official court reporter to record and transcribe all proceedings in all phases [of the case], including pretrial hearings, legal arguments, voir dire and selection of the jury, in-chambers conferences, any discussions regarding jury instructions, and all matters during the trial and in support thereof . . ."; and the court had granted the motion. After granting the motion, the court had the duty to see that the *entire* proceedings were transcribed; we must conclude that the failure to record and transcribe a portion of the voir dire examination of the jury and certain portions of the bench conferences, in light of the fact that Harris was represented on appeal by counsel other than the attorney at trial, constituted error. See *Ex parte Godbolt*, 546 So.2d 991 (Ala.1987).[1] Thus, the question becomes whether that error constituted reversible error.

> "'*When, [as in this case], a criminal defendant is represented on appeal by counsel other than the attorney at trial, the absence of a substantial and significant portion of the record, even absent any showing of specific prejudice or error, is sufficient to mandate reversal.* The wisdom of this rule is apparent. When a defendant is represented on appeal by the same attorney who defended him at trial, the court may properly require counsel to articulate the prejudice that may have resulted from the failure to record a portion of the proceedings. Indeed, counsel's obligation to the court alone would seem to compel him to initiate such disclosure. The attorney, having been present at trial, should be expected to be aware of any

1. Neither Temporary Rule 21, Ala.Temp.R.Crim.P., nor Rule 19.4, Ala.R.Crim.P., was in effect when this Court decided *Ex parte Godbolt*. Nonetheless, the rationale of *Ex parte Godbolt* is applicable to the facts of this case.

errors or improprieties which may have occurred during the portion of the proceedings not recorded. But *when a defendant is represented on appeal by counsel not involved at trial (as in this case), counsel cannot reasonably be expected to show specific prejudice. To be sure, there may be some instances where it can readily be determined from the balance of the record whether an error has been made during the untranscribed portion of the proceedings. Often, however, even the most careful consideration of the available transcript will not permit us to discern whether reversible error occurred while the proceedings were not being recorded. In such a case, to require new counsel to establish the irregularities that may have taken place would render illusory an appellant's right to [have the reviewing court] notice plain errors or defects....*

"'*We do not advocate a mechanistic approach to situations involving the absence of a complete transcript of the trial proceedings. We must, however, be able to conclude affirmatively that no substantial rights of the appellant have been adversely affected by the omissions from the transcript.* When ... a substantial and significant portion of the record is missing, and the appellant is represented on appeal by counsel not involved at trial, such a conclusion is foreclosed....'"

Ex parte Godbolt, 546 So.2d at 997. (Citations omitted; emphasis added.) (Quoting with approval *United States v. Selva*, 559 F.2d 1303, 1305–06 (5th Cir.1977)).

We have carefully reread those portions of the record where each omission occurred and have reread the several pages before and the several pages after those omitted portions, to ascertain, if possible, the content and substance of the discussions not transcribed, so as to determine whether "a substantial and significant portion of the record" is missing and to determine whether we could "conclude affirmatively that no substantial rights of [Harris] have been adversely affected by the omissions from the transcript." *Id.*

From this extensive review, and given the particular facts of this case, we have concluded that the untranscribed portions of the proceedings did not constitute "a substantial and significant portion of the record" and we have "conclud[ed] affirmatively that no substantial rights of [Harris] have been adversely affected by the omissions from the transcript." Rather, we have concluded that the trial court's rulings related to certain omitted portions of the proceedings were adverse to the state and that the content or substance of the other discussions that occurred out of the hearing of the court reporter was general in nature and had no effect on the outcome of the case. We conclude, under the facts of this case, that the error in failing to ensure that the entire proceedings were transcribed was harmless. Therefore, Harris's conviction was properly affirmed.

We note for the Bench and Bar that our holding that the failure to ensure a complete transcript of the proceedings was harmless error is strictly limited to the facts of this case and to the record before us; we are not to be understood as holding that in all cases such an error will be considered harmless. Rather, each case will be limited to and determined on its own facts.

AFFIRMED.

HORNSBY, C.J., and MADDOX and SHORES, JJ., concur.

ALMON, J., concurs in the result.

ADAMS, J., dissents.

ADAMS, Justice (dissenting).

I must respectfully dissent from the majority opinion. In my view, the defendant, under Alabama law as it has developed since *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), was entitled to require the prosecutor to explain the reasons for her peremptory challenges of black veniremembers. The venire consisted of 17 black members and 33 white members. During the selection process, the prosecutor challenged 12 of the black veniremembers with her 19 allotted peremptory strikes. Thus, she challenged 71% of the black veniremembers, but only 21% of the white veniremembers.

These facts, standing alone, are sufficient to raise an inference of discrimination, but the inference is further strengthened by an additional fact. As the Court of Criminal Appeals observed, this prosecutor "has a history of using peremptory challenges to discriminate against black jurors." *Harris v. State*, 632 So.2d 503 (Ala.Crim.App.1992) (quoting *Hood v. State*, 598 So.2d 1022, 1024 (Ala.Crim.App.1991)). "An example of what appears to be a systematic practice of discrimination is a relevant factor to be considered both at the trial level and on review in assessing the strength of the defendant's *prima facie* case." *Ex parte Bird*, 594 So.2d 676, 681 (Ala.1991).

Notwithstanding these factors, the Court of Criminal Appeals determined that the defendant had failed to present a *prima facie* case of racial discrimination in jury selection, and, consequently, that the prosecutor was not required to justify her challenges. That court's disposition of this issue is inexplicable and erroneous, as is this Court's majority opinion, which, *sub silentio*, concurs in that court's conclusion.

The readiness of the judiciary to guard against inroads into constitutional guarantees must not depend on its assessment of the merits of the underlying case. I cannot, therefore, justify the conclusion that the facts presented by the defendant do not require us to remand this cause for further proceedings at which the State would be required to explain its challenges. Consequently, I must respectfully dissent.

On Application for Rehearing

PER CURIAM.

The issues raised on application for rehearing have been resolved by *Ex parte Giles*, 632 So.2d 577 (Ala.1993). The application is overruled.

APPLICATION OVERRULED.

MADDOX, ALMON, SHORES, ADAMS, HOUSTON, STEAGALL and INGRAM, JJ., concur.

Olin GRIMSLEY

v.

STATE.

CR 91-1681.

Court of Criminal Appeals of Alabama.

July 23, 1993.

Rehearing Denied Sept. 3, 1993.

Certiorari Denied Jan. 7, 1994
Alabama Supreme Court 1921893.

Defendant was convicted in the Montgomery Circuit Court, Edward Jackson, J., of murder. Defendant appealed. The Court of Criminal Appeals, Bowen, P.J., held that: (1) statements made by defendant to investigator of prospective defense counsel were not protected by attorney-client privilege; (2) defendant was entitled to question witness regarding whether witness was on probation; and (3) fact of outstanding warrants for arrest of witness' husband were admissible to show her bias and prejudice.

Reversed and remanded.

1. Witnesses ⇐199(1)

Statements made by defendant to investigator of prospective defense counsel were not protected by attorney-client privilege; investigator was employed by paralegal who worked for attorney and who also had his own investigating firm, and there was no showing that attorney had any knowledge that his paralegal was using investigator to make initial contact with potential client. U.S.C.A. Const.Amend. 6; Code 1975, § 12-21-161.

2. Criminal Law ⇐641.12(2)

Indictment and Information ⇐144.1(1)

Where state intrudes into defendant's attorney-client privilege and learns defense strategy, dismissal of indictment may be only viable remedy.

(5)

No. 93-7659

In The

Supreme Court of the United States

October Term, 1994

LOUISE HARRIS,

Petitioner,

vs.

STATE OF ALABAMA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Alabama

JOINT APPENDIX

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Montgomery County Circuit Court

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07/10/89 Jury selection for trial begins.

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07/13/89 The penalty phase hearing before the jury begins.

07/13/89 The jury returns an advisory sentencing verdict of life imprisonment without parole by vote of 7-5.

08/04/89 Sentencing hearing before Judge Randall Thomas is held.

08/11/89 Louise Harris is sentenced to death by the circuit court judge.

01/23/90 Court grants state's motion to modify sentencing order and submits new order imposing death sentence.

Alabama Court of Criminal Appeals

06/12/92 Court affirms conviction and sentence of death.

11/25/92 Court denies Mrs. Harris's application for rehearing.

Supreme Court of Alabama

06/25/93 Court affirms conviction and sentence of death.

10/29/93 Louise Harris application for rehearing is denied.

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

STATE OF ALABAMA,	)	
Plaintiff,	)	CRIMINAL CASE
	)	NO. 88-1237-TH
vs.	)	
LOUISE HARRIS,	)	
	)	
Defendant.	)	
	)	

SENTENCING ORDER

The findings contained in this order are based upon the evidence presented at trial, the evidence presented at the sentencing hearing before the jury, the presentence report with the exception of the victim impact statement which the Court has not read and will not consider, and the evidence presented at the sentencing hearing before this Court. The Court has considered all contentions made by the parties. The Court has also considered the jury's advisory verdict.

GENERAL FINDINGS CONCERNING THE DEFENDANT AND THE CRIME

The defendant, Louise Harris, was born July 16, 1953, the oldest of six children. The defendant had a normal childhood and never caused any problems or got into any trouble. She has been married twice, the last marriage being to Isaiah Harris, the victim. She also entered into a common-law relationship. She is the mother of three children. The defendant engaged in an affair with Lorenzo

McCarter, a co-defendant, which began during her marriage to the victim and continued until their arrests.

The defendant's health has been good and she completed the eleventh grade. At the time of her arrest, she held three part-time jobs, two as a personal maid and one as an institutional cook. She enjoyed a good reputation in the community.

The defendant was evaluated at Taylor Hardin Secure Medical Facility where it was the consensus opinion of three psychiatrists that she was competent to stand trial and there was no basis for an insanity defense in this case. The insanity plea was withdrawn by the defendant prior to trial.

The defendant married Isaiah Harris, a deputy Sheriff, in 1984. She filed for divorce in early 1987 but the complaint was dismissed by agreement. She engaged in an extramarital affair with Lorenzo McCarter, a co-defendant, beginning in 1987 and continuing until his arrest.

The defendant asked Mr. McCarter to hire someone to kill her husband. Mr. McCarter approached Michael Sockwell and Alex Hoods, co-defendants, to get rid of Mr. Harris and paid them $100 total when they agreed to kill him. The defendant furnished the funds. On March 10, 1988, the day of the shooting, the defendant met with the co-defendants to finalize plans.

That evening at about 11:00 p.m., the victim left home for work, leaving the defendant at home. Waiting for him at the stop sign at the entrance/exit at Regency Park was Michael Sockwell. Across the Troy Highway

were Mr. McCarter and Mr. Hoods, along with Freddie Patterson, in Mr. Hoods' car. The defendant notified them that her husband was leaving by calling Mr. McCarter's beeper. As Mr. Harris was about to leave Regency Park, Mr. Sockwell fired the shotgun once at extremely close range, resulting in a skull fracture with loss of facial features. Mr. Harris died in his car as a result of that shotgun wound. The shotgun was recovered later off the roadway.

When Mr. Harris failed to arrive at work at 11:25 p.m., his superiors called his home twice and spoke with the defendant, who asked no questions and expressed no concern about her husband. The body was discovered by two citizens who telephoned the Montgomery Police Department. The first officer arrived shortly after midnight. Co-workers of Mr. Harris went to the defendant's home to tell her of his death. They noticed a lack of tears and even questioned her as to her lack of grief and criticism of the victim. The defendant admitted having an affair with Lorenzo McCarter, saying he made love to her like nobody else could.

Mr. Harris' death could have provided financial benefits as follows: $12,000 life insurance, $4,555.53 retirement, $20,000 state peace officer benefits, $50,000 federal peace officer benefits and $150,000 workmen's compensation, for a total of $246,555.53. At the time of his death, the defendant was his spouse.

AGGRAVATING CIRCUMSTANCES

The Court is aware that only the aggravating circumstances set out in *Code of Alabama* 1975, Section 13A-5-49

may be considered against the defendant. No other circumstances have been or will be considered in aggravation.

The Section 13A-5-49(1) aggravating circumstance is not present.

The Section 13A-5-49(2) aggravating circumstance is not present.

The Section 13A-5-49(3) aggravating circumstance is not present.

The Section 13A-5-49(4) aggravating circumstance is not present.

The Section 13A-5-49(5) aggravating circumstance is not present.

The Section 13A-5-49(6) aggravating circumstance is present. The defendant stood to gain financial benefits including insurance, retirement, state and federal peace office, and workmen's compensation benefits. Moreover, money was paid to Michael Sockwell and Alex Hoods to kill the victim.

The one aggravating circumstance the Court has found and will consider has been proven beyond a reasonable doubt.

STATUTORY MITIGATING CIRCUMSTANCES

The Section 13A-5-51(1) mitigating circumstance is present. The defendant has no criminal history.

The Section 13A-5-51(2) mitigating circumstance is not present.

The Section 13A-5-51(3) mitigating circumstance is not present.

The Section 13a[sic]-5-51(4) mitigating circumstance is not present. While there is evidence there were others involved and this defendant did not pull the trigger, her participation was such that, but for her, there probably would never have been a killing. She planned it, provided the financing and stood to benefit the most.

The Section 13A-5-51(5) mitigating circumstance is not present.

The Section 13A-5-51(6) mitigating circumstance is not present.

The Section 13A-5-51(7) mitigating circumstance is not present.

NON-STATUTORY MITIGATING CIRCUMSTANCES

Defendant's attorneys did a thorough job of presenting non-statutory mitigating circumstances evidence, and this Court has considered all of it.

The defendant had family and friends who cared about her and had relationships with her which were beneficial to them and her. She was a hardworking and respected member of the community. She was a steady worker in her church and community. She was held in high regard by her employers and friends.

Some of the evidence was circumstantial and included the testimony of individuals with criminal histories and/or a pending charge. Counsel for the defendant did a thorough job in exploring all weaknesses of the

State's case, including the credibility of witnesses. This Court has no reason to go behind the guilty verdict of the jury and will not do so. This Court finds the defendant guilty beyond a reasonable doubt.

The Court has carefully considered all of the non-statutory mitigating circumstance evidence proffered by the defendant. The Court has also given careful consideration to all of the defendant's contentions concerning non-statutory mitigating circumstances including all of the arguments of her attorneys and the contentions reflected in her proffered jury instruction listing mitigating circumstances. All of the defense's non-statutory mitigating circumstance evidence has been carefully considered. In entering the non-statutory mitigating circumstance findings and the findings concerning statutory mitigating circumstances, the Court applied the burden of proof set out in Section 13A-5-45(g) and has gone further and resolved every legitimate doubt in the defendant's favor.

THE WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES

In weighing the aggravating and mitigating circumstances, the Court is aware of the nature of the process as defined in Section 13A-5-48. It is not a matter the Court takes lightly. After carefully considering the matter, the Court is convinced that the one statutory aggravating circumstance found and considered far outweighs all of the non-statutory mitigating circumstances, and that the sentence ought to be death.

ADJUDICATION OF GUILTY AND PRONOUNCEMENT OF SENTENCE

It is hereby ORDERED, ADJUDGED and DECREED that the defendant, Louise Harris, is guilty of the *Code of Alabama* 1975, Section 13A-5-40 (a)(7) capital offense of murder of Isaiah Harris done for a pecuniary or other valuable consideration or pursuant to a contract for hire.

It is further ORDERED, ADJUDGED and DECREED that for the capital offense for which she has been adjudged guilty, the defendant, Louise Harris, is hereby sentenced to death by electrocution. Pursuant to Alabama Rule of Appellate Procedure 8(d)(1), the date of execution is to be set by the Alabama Supreme Court at the appropriate time.

It is further ORDERED, ADJUDGED and DECREED that the defendant, Louise Harris, shall be returned to the custody of the Alabama Department of Corrections to await execution of sentence.

Done this the 23 day of Jan., 1990.

/s/ H. Randall Thomas
H. RANDALL THOMAS
Circuit Judge

Court of Criminal Appeals of Alabama.

Louise HARRIS

v.

STATE.

3 Div. 332.

June 12, 1992.

Rehearing Denied Nov. 25, 1992.

McMILLIAN, Judge.

The appellant was indicted for two counts of capital murder in the murder of Isaiah Harris: murder for pecuniary gain or pursuant to a contract for hire and murder of a deputy sheriff while the deputy was on duty. Following the introduction of the State's evidence, the appellant moved that the second count of the indictment be dropped, because, she argues, the State failed to prove that Harris was on duty at the time of the offense. The trial court granted this motion, and the case went to the jury only on the first count of indictment. The jury found the appellant guilty as charged in the first count of the indictment and recommended that she be sentenced to life imprisonment without the possibility of parole, seven jurors voting for life without parole and five voting for death by electrocution. Thereafter, a sentencing hearing was held before the trial court, after which the court ordered that the appellant be sentenced to death by electrocution.

The record indicates that the appellant was involved in an affair with Lorenzo McCarter, a codefendant, while she was married to Harris. The appellant and Harris had

experienced marital problems in the past, which the victim apparently believed he had solved when he promised to buy the appellant a house. The record indicates that the appellant asked McCarter to hire someone to kill her husband. McCarter approached a co-employee about doing "the job"; however, the co-employee refused and told his supervisor about the solicitation. McCarter then approached Michael Sockwell and Alex Hood, other co-defendants, to commit the offense. McCarter knew that Sockwell owned a gun. Prior to the offense, the appellant met with the three men and was shown the gun. Sockwell and Hood were paid $100 in advance to commit the offense, with the promise that more money would be paid upon completion of the murder. The State presented evidence of the existence of various insurance policies on the victim's life, with the appellant specified as the beneficiary.

The victim, who worked the night shift as a jailer, left his home at approximately 11:00 p.m. to go to work, after being awakened by the appellant a little later than usual. Immediately after Harris left home, the appellant paged McCarter on his beeper, giving the message that her husband was leaving. There was evidence that the appellant had paged McCarter on his beeper many times in the past to arrange liaisons. When he received the message in the instant case, McCarter was seated in Hood's car, located across the street from the entrance to the subdivision in which Harris and appellant lived. Also present in the car were Alex Hood and Freddie Patterson. Patterson was unaware of the conspiracy. Sockwell was hidden behind the hedge located at the entrance to the subdivision. Harris was driving to work in his own 1979 black

Ford Thunderbird automobile. When Harris stopped at the stop sign at the entrance of the subdivision, Sockwell shot him once in the face at close range with a shotgun. As a result, the lower half of the victim's face was blown off, leaving his teeth, tongue, and "matter" from his face blown across the car. After the shot, the victim's vehicle traveled slowly across the highway and came to a stop in a ditch.

When the victim failed to arrive at work by 11:25 p.m., a co-employee telephoned his home twice and spoke with the appellant. There was testimony that the appellant offered no assistance and that her speech was slow or sluggish. Two men, returning from work, discovered the victim's body shortly after midnight and telephoned the Montgomery Police Department. After the police arrived at the scene and identified the victim, several officers of the police department and employees of the Montgomery County Sheriff's Department went to the house of the victim and the appellant to notify the appellant of the victim's death. There was testimony that, upon being notified of the victim's death, the appellant began screaming and sobbing, but she shed no tears. Moreover, she became completely calm instantly in order to answer questions. A member of the Montgomery County Sheriff's Department, who knew both the appellant and the victim, testified that she asked the appellant why she did not appear to be upset, and that the appellant responded that she and the victim had been experiencing marital problems for some time. She also told the witness that she had engaged in several extramarital affairs, the current one being with Lorenzo McCarter. The appellant stated that she was in love with McCarter. In

response to questions asked by an investigator with the sheriff's department, she responded that McCarter's car was broken down in the vicinity, and when asked if McCarter could have killed the victim, the appellant responded, "If he did kill him I didn't tell him to." At trial, McCarter elected to testify against the appellant, in exchange for the prosecutor's promise not to seek the death penalty in his case.

I

The appellant argues that the trial court erred in removing her appointed attorney from the case when they sought "reasonable compensation" for representing her as a capital defendant. She further alleges error in the fact that she was not present at the hearing at which they were dismissed. A hearing was held on counsel's motion, during which appointed counsel requested that they receive $90 per hour or that they be excused. Although these appointed attorneys indicated that they preferred not to be excused from the appellant's case, the trial judge stated that because he was without authority to authorize higher compensation, he would relieve the attorneys of their appointment. The attorneys did not object. This matter was never raised again, either by the attorneys or by the appellant at any time prior to this appeal. See *Fisher v. State*, 587 So.2d 1027 (Ala.Cr.App.), cert. denied, 587 So.2d 1039 (Ala.1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1486, 117 L.Ed.2d 628 (1992) ("The appellant refers to § 15-1221(d), *Code of Alabama* 1975, which states that compensation for appointed counsel's trial preparation is limited to $1,000, at a rate of $20 an hour. The record contains no request by appellant or his

counsel for additional fees, nor were any claims made concerning the constitutionality of this statute. Therefore, this matter is waived on appeal.") Although the failure to object during a capital case does not preclude review of the alleged error, such failure weighs against a finding of error. *Kuenzel v. State*, 577 So.2d 474, 523 (Ala.Cr.App.1990), affirmed, 577 So.2d 531 (Ala.1991), cert. denied, ___ U.S. ___, 112 S.Ct. 242, 116 L.Ed.2d 197 (1991).

According to § 15-12-21, *Code of Alabama* 1975:

> "(a) If it appears to the trial court that such defendant is entitled to counsel, that such defendant does not expressly waive the right to assistance of counsel and that such defendant is not able financially or otherwise to obtain the assistance of counsel, the court shall appoint counsel to represent and assist the defendant; and it shall be the duty of such appointed counsel, as an officer of the court and as a member of the bar, to represent and assist said defendant.
>
> ". . . .
>
> "(d) Counsel appointed in cases described in subsections (a), (b), and (c) above . . . shall be entitled to receive for their services a fee to be approved by the trial court. The amount of such fee shall be based on the number of hours spent by the attorney in working on such case and shall be computed at a rate of $40.00 per hour for time expended in court and $20.00 per hour for time reasonably expended out of court in the preparation of such case. The total fees to any one attorney in any case, from the time of appointment through the trial of the case,

> including motions for new trial, shall not, however, exceed $1,000.00, except as follows: In cases where the original case involves a capital offense or a charge which carries a possible sentence of life without parole, the limit shall be $1,000.00 for out-of-court work, plus payment for all in-court work, said work to be billed at the aforementioned rates. Counsel shall also be entitled to be reimbursed for any expenses reasonably incurred in such defense to be approved in advance by the trial court. Retrials of a case shall be considered a new case."

In *Ex parte Grayson*, 479 So.2d 76, 79-80 (Ala.1985), cert. denied, 474 U.S. 865, 106 S.Ct. 189, 88 L.Ed.2d 157 (1985), the appellant argued that Alabama's system of compensation for appointed counsel denied him of his rights to due process and equal protection of the laws, because of its application to capital cases. Apart from his equal protection argument, the appellant argued "that a capital defendant can not have effective assistance of counsel and, therefore, is deprived of liberty without due process, with such a limit on the amount to be paid to counsel." *Id.* at 79. The Alabama Supreme Court held adversely to the appellant on both issues, stating:

> "These contentions are made on the premise that lawyers will not provide effective assistance unless paid a certain amount of money. But the legal profession requires its members to give their best efforts in 'advancing the "undivided interest of [their] client[s]." ' *Polk County v. Dodson*, 454 U.S. 312, 318-19, 102 S.Ct. 445, 449-50, 70 L.Ed.2d 509 (1981). This Court, in *Sparks v. Parker*, 368 So.2d 528, 530 (Ala. 1979), quoted the New Jersey Supreme Court as follows:

> " 'We know of no data to support a claim that an assigned attorney fails or shirks in the least the full measure of an attorney's obligations to a client. Our own experience, both at the bar and on the bench, runs the other way. A lawyer needs no motivation beyond his *sense of duty* and his *pride*. [*State v. Rush*, 46 N.J. 399, 405-07, 217 A.2d 441, 444-45 (1966).]'
>
> "We reaffirm this belief that attorneys appointed to defend capital clients will serve them well, as directed by their consciences and the ethical rules enforced by the state bar association. The counsel compensation statute, § 15-12-21, then, does not deprive petitioner of due process and equal protection of the laws."

Ex parte Grayson, supra, at 79-80 (emphasis added in *Grayson*). Thus, the Alabama Supreme Court has determined that the compensation statute does not deprive a defendant of his right to due process, and because this court is bound by the decisions of the Alabama Supreme Court, see *Scott v. State*, 570 So.2d 813, 816 (Ala.Cr.App.1990), we find no constitutional error in the trial court's granting of the appellant's attorneys' request to be removed from the case if they could not be paid salaries in excess of the statutory limit.

The appellant also argues that it was error for the trial court to conduct the hearing in which the appellant's original trial counsel were removed in her absence. The appellant argues that, as a defendant, she was entitled to be present during every stage, including every pretrial matter, of her trial. In *Johnson v. State*, 335 So.2d 663, 671-72 (Ala.Cr.App.), cert. denied, 335 So.2d 678 (Ala.1976), cert. denied, 429 U.S. 1026, 97 S.Ct. 649, 50

L.Ed.2d 629 (1976), the defendant argued that the trial court erred in overruling his motion to be present at the hearing of his preliminary pretrial motions. This court held:

> "Preliminary motions hearings and pretrial motions hearings are not viewed by this Court as a 'critical stage' of the trial. *Berness v. State*, 263 Ala. 641, 83 So.2d 613. 23 C.J.S. § 974 states in pertinent part:
>
> > " 'The trial does not embrace every procedural and administrative step and judicial examination of every issue of fact and law during the trial, and accused's presence is not necessary during proceedings which are no part of the trial, such as preliminary or formal proceedings or motions which do not affect his guilt or innocence. . . .
> >
> > " 'It has been held that accused's presence is not necessary at the hearing and determination of a demurrer to the indictment or information, of a motion to quash the same, of a plea in abatement, or of a motion for leave to file an information, or to summon witnesses, or to amend the information . . . or of other motions. . . .
> >
> > " ' . . . Thus, the exclusion of accused during conferences of court and counsel on questions of law, at the bench or in chambers, has been considered not to constitute a denial of the right of accused to be present at every stage of the trial. . . . ' (Footnotes omitted.)

> "Also see: *State v. Neal*, 350 Mo. 1002, 169 S.W.2d 686; *Rosebud County v. Flinn*, 109 Mont. 537, 98 P.2d 330."

See also *Maund v. State*, 361 So.2d 1144 (Ala.Cr.App.1978) (wherein this court rejected the defendant's argument that it was error for a pretrial hearing on a motion to disclose the State's evidence to have been held in defendant's absence, holding that pre-trial hearings are not a "critical stage" of a trial at which a defendant has a right to be present).

Similarly, federal cases have construed Rule 43 of the Federal Rules of Criminal Procedure, which provides that a defendant must be present at every stage of his trial to be inapplicable where the "privilege" of presence would be of no real benefit to the defendant. See *Peterson v. United States*, 411 F.2d 1074 (8th Cir.1969), cert. denied, 396 U.S. 920, 90 S.Ct. 247, 24 L.Ed.2d 199 (1970). See also *Stein v. United States*, 313 F.2d 518 (9th Cir.1962), cert. denied, 373 U.S. 918, 83 S.Ct. 1307, 10 L.Ed.2d 417 (1963) (the presence of a defendant, to be required, must bear a reasonable substantial relation to the opportunity to defend, because the constitution does not assure the privilege of presence when the presence would be useless).

The question remains whether a distinction should be made when the case is a capital case. In *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir.1982), cert. denied, 464 U.S. 1002, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983), the court applied a stricter no-waiver rule to the right of presence for a capital defendant, the rule for a noncapital defendant, in federal court, being the "knowing-and-voluntary-consent requirement" to waiver. However, in

determining a capital, as opposed to noncapital, defendant's rights pertaining to waiver of presence, the court began with the same analysis used in *Johnson v. State*, supra, that the hearing must be a critical or a central part of the trial. The court reasoned:

> "A defendant's right to be present at all stages of a criminal trial derives from the confrontation clause of the Sixth Amendment and the due process clause of the Fourteenth Amendment. *Illinois v. Allen*, 397 U.S. 337, 338, 90 S.Ct. 1057, 1058, 25 L.Ed. 353 (1970); *Hopt v. Utah*, 110 U.S. 574, 579, 4 S.Ct. 202, 204, 28 L.Ed. 262 (1884). This right extends to all hearings that are an essential part of the trial – i.e., to all proceedings at which the defendant's presence 'has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.' *Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934). Compare *Hopt v. Utah*, supra (defendant has right to be present at empaneling of jurors); *Bartone v. United States*, 375 U.S. 52, 84 S.Ct. 21, 11 L.Ed.2d 11 (1963) (court cannot impose sentence in absence of defendant); *with United States v. Howell*, 514 F.2d 710 (5th Cir.1975); *cert. denied*, 429 U.S. 838, 97 S.Ct. 109, 50 L.Ed.2d 105 (1976) (no right to be present at *in camera* conference concerning attempted bribe of juror); *United States v. Gradsky*, 434 F.2d 880 (5th Cir.1970), *cert. denied*, 409 U.S. 894, 93 S.Ct. 203, 34 L.Ed.2d 151 (1971) [1972] (right to presence does not extend to evidentiary hearing on suppression motion.) We have already held that the penalty phase is an integral part of a capital trial for purposes of cross-examination. *See* text *supra* at 35-51. For similar reasons, we conclude that the capital defendant's interest in attending his sentencing hearing is as great as his interest in being present at the guilt determining stage. *Cf. Gardner v. Florida*, 430 U.S. [349] at 358, 97 S.Ct. [1197] at 1204 [51 L.Ed.2d 393] (sentencing is 'critical stage' of capital trial). Hence we hold that the right to be present extends to the sentencing as well as the guilt portion of a capital trial."

Id. at 1256-57. But see *Adams v. State*, 28 Fla. 511, 10 So. 106 (1891).[1]

The court in *Proffitt v. Wainwright*, supra, acknowledged in a footnote that in *Snyder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934), "which was a capital case, [the Court] stated that the sixth amendment privilege of confrontation could 'be lost by consent or at times even by misconduct.' *Snyder v. Massachusetts*, 291 U.S. at 106, 54 S.Ct. at 332." *Proffitt v. Wainwright*, supra, at 1257, n. 43. See also *State v. Davis*, 290 N.C. 511, 227 S.E.2d 97, 110 (1976) ("[t]he strict rule that an accused cannot waive his right to be present at every stage of his *trial* upon an indictment charging a capital felony, *State v.*

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[1] In *Adams v. State*, supra, the court held that the judge committed reversible error by removing the defendant in a murder trial from the courtroom during a discussion between trial judge and counsel, in the jury's absence, regarding a witness's competency. The court held that a defendant has the right to be present, and must be present, during the trial of a capital case; thus no action by the trial court may occur in a defendant's absence, because his right to be present extends to discussions of questions of law as well as questions of fact. The court held that the trial judge's offer to repeat the argument in the defendant's presence could not possibly have restored the accused to the position of hearing what had been said in his absence.

Moore, 275 N.C. 198, 166 S.E.2d 652 (1969), is not extended to require his presence at the hearing of a pretrial motion for discovery when he is represented by counsel who consented to his absence, and when no prejudice resulted from his absence"). See also *State v. Piland*, 58 N.C.App. 95, 293 S.E.2d 278 (1982), appeal dismissed, 306 N.C. 562, 294 S.E.2d 374 (1982) "[t]he [capital] defendant in this case has not demonstrated any prejudice to him by his absence from a part of the hearing. The evidence elicited was not disputed and there has been no showing that it would have been different had the defendant been present").

Thus, if the appellant's presence, in the present case, would have been useless to her defense and if the hearing was not considered to be a "critical stage" of her trial, then we can find no error in the appellant's absence from the hearing. In *Lowery v. Cardwell*, 535 F.2d 546 (9th Cir.1976), the court held the record before it to be insufficient to determine whether the doctrine of fundamental fairness required the defendant's presence at an in-chambers conference during which the defense counsel sought to withdraw from the case. This conference occurred during trial and was based on the defense counsel's belief that the defendant had lied on the witness stand. The court remanded the case for a hearing to determine the defense counsel's reasons for his motion to withdraw and the details of what had occurred during this conference. On remand, the court disclosed the defense counsel's reasons for seeking to withdraw and stated that the only other matter discussed during the hearing concerned the length of the trial. No error was found in the trial court's action in conducting the hearing

outside the defendant's presence. *Lowery v. Cardwell*, 575 F.2d 727 (9th Cir.1978). Similarly, in the present case, the trial court's decision to allow the appellant's trial counsel to be removed from the case was based on a question of law, the dictates of a statute, a matter concerning which the appellant's presence would be useless. As noted in *Proffitt v. Wainwright*, supra, a defendant's right to be present arises from his right to confrontation and, in the present case, no witnesses were involved in this hearing. The appellant has been unable to suggest or demonstrate any possibility of prejudice resulting from her absence. Therefore, we find no error in this matter.

II

The appellant argues that her conviction is due to be reversed because, she argues, the prosecutor used her peremptory strikes in a racially discriminatory manner and then refused to give reasons for those strikes. The record indicates that, in making his objection pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), defense counsel alleged that there were 17 black veniremembers on a panel of 51, and that the prosecutor used 11 of her 19 strikes to remove blacks. The prosecutor responded that the appellant had failed to make a prima facie showing pursuant to *Batson v. Kentucky*, supra. She stated that in Montgomery County, the black population constituted approximately 40% of the general population. She noted that of the 14 jurors, which included the 2 alternates, 8 were white and 6 were black. Of the two alternates, one was white and one was black. She concluded that, of the original 12 jury members, 7 would be white and 5 black, which would make the black

percentage of representation on the jury over 40%. Defense counsel responded, stating that, because the prosecutor used 11 of her 19 strikes against blacks, she should have to show some reason for doing so. The trial court denied the appellant's motion.

In a companion case, which was tried by the same prosecutor in the same county, this court addressed this same claim under a basically identical factual situation. In *Hood v. State*, 598 So.2d 1022 (Ala.Cr.App.1991), the trial court found that the defendant failed to make a prima facie showing under *Batson* that the State had used its peremptory challenges in a discriminatory manner. In that case, the jury venire consisted of 44 veniremembers, 15 of whom were black. The prosecutor exercised 10 of her 16 peremptory challenges against black veniremembers, resulting in a jury composed of 5 blacks and 7 whites. In that case, as in the present case, the defendant "relied only on the number of blacks struck by the State. Defense counsel did not bring to the circuit court's attention any other factor which might tend to show that the prosecutor purposefully discriminated against potential jurors on the basis of race." In *Hood v. State*, this court relied on the following language in *Harrell v. State*, 571 So.2d 1270 (Ala.1990), cert. denied, 499 U.S. 984, 111 S.Ct. 1641, 113 L.Ed.2d 736 (1991):

> "[A] defendant cannot prove a prima facie case of purposeful discrimination solely from the fact that the prosecutor struck one or more blacks from the jury. A defendant must offer some evidence in addition to the striking of blacks that would raise an inference of discrimination. When the evidence shows only that blacks were struck and that a greater percentage of blacks

> sat on the jury than sat on the lawfully established venire, an inference of discrimination has not been created. Logically, if statistical evidence may be used to establish a prima facie case of discrimination, by showing a discriminatory impact, then it should also be available to show the absence of a discriminatory purpose."

Id. at 1271-72. This court, in *Hood v. State*, supra, stated:

> "Although both this court and the Alabama Supreme Court have observed that the assistant district attorney who prosecuted the appellant has a history of using peremptory challenges to discriminate against black jurors, see *Ex parte Bird & Warner*, [Ms. 89-1061 and 89-1062, December 6, 1991] [594] So.2d [676] (Ala.1991), that history, standing alone, does not establish a prima facie case for the defense in any given case. Compare *Ex parte Harrell*, 571 So.2d at 1272 (past conduct of the prosecutor, in connection with other facts relating to the particular venire, is relevant in determining whether an inference of discrimination exists); *Ex parte Bird & Warner*, [594] So.2d at [681-82] ('evidence [of past history], in conjunction with the disparate impact of the peremptory strikes in this case, . . . raises an inference of discriminatory intent'). In this case, the prosecutor did not state any reason for striking any member of the venire. Under these circumstances, *Harrell* dictates that we uphold the trial court's determination that the appellant did not establish a prima facie case under *Batson* and *Ex parte Branch*, 526 So.2d 609 (Ala.1987), for the following reasons: (1) the trial court was presented with no evidence of alleged discrimination other than the number of blacks struck by the State, and (2) the peremptory striking

> process did not have a disparate impact upon the number of blacks empaneled as jurors. Instead, the process resulted in a jury of proportionately more black citizens than the venire from which it was selected."

Because the same relevant facts and law apply to the present case, as those pertinent to this court's holding in *Hood v. State*, supra, we find that the trial court properly held that the appellant failed to make a prima facie showing of purposeful discrimination in the prosecutor's use of peremptory challenges against blacks.

III

The appellant argues that she was charged under a duplicitous indictment and that the trial court erred in failing to give the jury a unanimity instruction. Specifically, the appellant argues that the jury was improperly charged that all 12 had to agree that the appellant committed murder "either for pecuniary gain *or* pursuant to a contract or for hire in order to find her guilty of capital murder." The appellant acknowledges that such an instruction tracks the language of the indictment, but she argues that this instruction, and the indictment on which it was based, allowed her to be convicted of capital murder by a nonunanimous jury. She argues that "some of the jurors [might have] believed she had hired one or more men to kill her husband, while" others might have believed she had committed the murder for reasons of pecuniary gain, thus allegedly resulting in a non-unanimous verdict.

The record indicates that the count of the indictment that went to the jury charged that the defendant did "intentionally cause the death of Isaiah Harris by shooting him with a shotgun for pecuniary or other valuable consideration or pursuant to a contract or for hire in violation of Section 13A-5-40 of the Code of Alabama 1975 as amended." Pursuant to Section 13A-5-40(a)(7), *Code of Alabama* 1975 murder is made capital if it is "done for a pecuniary or other valuable consideration or pursuant to a contract or for hire."

> "A way of framing the issue is suggested by analogy. Our cases reflect a long-established rule of the criminal law that an indictment need not specify which overt act, among several named, was the means by which a crime was committed. In *Andersen v. United States*, 170 U.S. 481 [18 S.Ct. 689, 42 L.Ed. 1116] (1898), for example, we sustained a murder conviction against the challenge that the indictment on which the verdict was returned was duplicitous in charging that theft occurred through both shooting and drowning. In holding that 'the Government was not required to make the charge in the alternative,' *id.*, at 504 [18 S.Ct. at 694], we explained that it was immaterial whether death was caused by one means or the other. Cf. *Borum v. United States*, 284 U.S. 596 [52 S.Ct. 205, 76 L.Ed. 513] (1932) (upholding the murder conviction of three co-defendants under a count that failed to specify which of the three did the actual killing); *St. Clair v. United States*, 154 U.S. 134, 145 [14 S.Ct. 1002, 1006, 38 L.Ed. 936] (1894). This fundamental proposition is embodied in the Federal Rules of Criminal Procedure 7(c)(1), which provides that '[i]t may be

> alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means.' "

Schad v. Arizona, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991). See *Thompson v. State*, 542 So.2d 1286 (Ala.Cr.App.1988), affirmed, 542 So.2d 1300 (Ala.1989), cert. denied, 493 U.S. 874, 110 S.Ct. 208, 107 L.Ed.2d 161 (1989) (wherein the indictment charged that the defendant caused the victim's death "by striking her with his fist and by dragging her behind an automobile, either or both of which acts resulted in the aspiration of stomach contents and suffocation"). See also *Boulden v. State*, 278 Ala. 437, 179 So.2d 20 (1965) (wherein the court found counts of the indictment that "charge in the alternative the means by which the offense was committed," i.e., that the victim "died as a result of bullet wounds inflicted by a pistol or pistols or by a gun or guns, or as a result of cuts inflicted by use of a knife or other sharp instrument," were proper).

> "In effect, the indictment charged, in a single count, alternative methods of proving the same crime. See *Sisson v. State*, 528 So.2d 1151 (Ala.Cr.App.1987), affirmed, *Ex parte State*, 528 So.2d 1159 (Ala.1988) ('Section 32-5A-191(a)(1) and (2) are merely two different methods of proving the same offense – driving under the influence.') 'When an offense may be committed by different means or with different intents, such means or intents may be alleged in an indictment in the same count in the alternative.' Alabama Code 1975, § 15-8-50. *Chappell v. State*, 52 Ala. 359, 360-61 (1875), held that in an indictment for common law robbery, the taking of the

> property from the victim may be charged to have been 'against his will, by violence to his person' or 'by putting him in such fear as [to cause him] unwillingly to part with the same' in different counts or in the same count in the alternative."

Williams v. State, 538 So.2d 1250, 1252 (Ala.Cr.App.1988). Thus, in *Tucker v. State*, 537 So.2d 59 (Ala.Cr.App.1988), this court held that in indictment that charged the capital murder of a police officer in alternative language complied with the statutory language of § 13A-6-2(a)(1) and § 13A-5-40(a)(5), *Code of Alabama* 1975. By statutory definition, the murder of a police officer is made capital when the officer is intentionally killed "while such officer is on duty" or "because of some official or job-related act or performance." This court reasoned:

> " 'An apparent purpose of these several provisions [§ 15-8-50, 51, 52] is to obviate the necessity of a multiplicity of counts, permitting one count to serve the purposes accomplished by several at common law. . . . ' *Horton v. State*, 53 Ala. 488, 492 (1875). The indictment was properly framed to conform to the proof. It charged only one offense – capital murder of a peace officer – which was committed for one of two reasons: either because the officer was trying to arrest Tucker's stepmother or because the officer was trying to arrest Tucker. This indictment completely satisfied the constitutional requirements of due process. *Summers v. State*, 348 So.2d 1126, 1132 (Ala.Cr.App.), cert. denied, *Ex parte Summers*, 348 So.2d 1136 (Ala.1977), cert. denied, 434 U.S. 1070, 98 S.Ct. 1253, 55 L.Ed.2d 773 (1978). See *Davis v. State*, 505 So.2d 1303, 1304 (Ala.Cr.App.1987) (operating a motor

> vehicle 'while under the influence of intoxicating liquors or narcotic drugs'); *Wilson v. State*, 84 Ala. 426, 4 So. 383 (1888) (murder 'by striking him in the head . . . or by choking him with a piece of . . . cord'); *King v. State*, 137 Ala. 47, 34 So. 683 (1903) (murder 'by hitting him or by striking him with a miner's pick, or by stabbing or cutting him with a knife, or with some sharp instrument')."

Tucker v. State, supra at 61.

As in *Tucker v. State*, supra, in the present case, the indictment in the present case charged only one offense – capital murder for hire – which was committed for one of two reasons: either Isaiah Harris was killed pursuant to a contract in order for Louise Harris and Lorenzo McCarter to continue their relationship, or Isaiah Harris was killed pursuant to a contract in order for the perpetrators to secure pecuniary gain, specifically $100 paid by Louise Harris and the proceeds of certain insurance policies on the victim's life, which were to be divided among all the participants. Thus, the indictment was not duplicitous.

Moreover, the trial court's charge concerning jury unanimity were proper. The trial court instructed the jury that it had to reach a unanimous verdict. The appellant argues that because the trial court charged the jurors that all 12 must agree as to one of three possible verdicts – guilty of the capital offense, guilty of lesser-included offense, or not guilty – the trial court's instructions were improper. Specifically, the appellant argues that the instruction was error because it did not require the unanimity as to one of the alternative theories of the capital

offense, i.e., murder for hire, murder pursuant to a contract, or murder for pecuniary gain. However, because we have previously concluded that the jury did not have to decide between this alternative language, the trial court committed no error in its instructions. See *Schad v. Arizona*, supra (it was constitutionally permissible for the jurors to agree on a unanimous verdict based on any combination of the alternative means to a single offense. 501 U.S. at ___, 111 S.Ct. at 2493-506).

IV

The appellant argues that the holding of "various proceedings" outside her presence violated her right to a fair trial and determination of punishment, as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by Alabama law. The appellant cites a number of pretrial proceedings at which she alleges that she was not present. The State submits that the record affirmatively shows that the appellant was present at each proceeding, except at the hearing at which her initial trial counsel was removed (see Part I) and during a hearing on a motion to produce. The appellant cites three additional hearings from which she was absent, each of which addressed a number of subjects, and each of which was held in chambers; these hearings were held on March 8, 1989; April 10, 1989; and April 19, 1989, respectively. The record notes that Ellen Brooks (assistant district attorney), James H. Evans (district attorney), David Vickers, Knox Argo, and Barry Leavell were present at the first hearing. No mention is made of the appellant's presence. As to the second hearing, the

record fails to specifically note who was present; however, during the course of the hearing, it is clear that Knox Argo, Eric Bowen, Ellen Brooks, and Ms. Baker were present. At the third hearing, the record indicates that James H. Evans, David Vickers, and Eric Bowen were present. There is no indication that the appellant was present at these latter two hearings, and we are unable to glean from the conversations during the hearings whether the appellant was present.

As to these pretrial hearings, which the appellant argues were held in her absence and at which the State argues the appellant was present, it should be noted that this court ordinarily will not presume error from a silent record. *Atchison v. State*, 565 So.2d 1186 (Ala.Cr.App.1990). However, even assuming that the record's failure to mention the appellant's presence indicates that she was in fact not present, we find no error in her absence during these hearings. The particular matters raised during these hearings, which the appellant argues required her presence in order to aid her counsel, were discussions of a public trial, evidentiary plans of the State, defense motions for the State to produce any statements allegedly made by the appellant, a defense motion requesting criminal records on certain State's witnesses,[2] and a brief rendition by the State of what it anticipated its case and evidence would entail. Because the trial

[2] The trial court noted that the prior criminal record of any State's witnesses should be turned over by the prosecutor pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Moreover, the trial court ordered that the State turn over any information on prior convictions of State's witnesses if they were known to them. The trial court also ordered the State's entire file to be turned over to the appellant. Eventually, during the trial, the court allowed defense counsel to ask certain

court ordered the State to turn over its entire file on this case to the defense, there is no error in the defendant's absence during the State's brief rendition of its evidence, because the appellant could have suffered no prejudice. The other matters involved questions of law, involved no witness testimony, and from the discussions therein, it is clear that the appellant's presence would not have aided her defense. See *Maund v. State*, supra; *People v. Teitelbaum*, 163 Cal.App.2d 184, 329 P.2d 157 (1958), cert. denied, 359 U.S. 206, 79 S.Ct. 738, 3 L.Ed.2d 759 (1959) (wherein there was no error in the holding of eight conferences in chambers, because in none of these proceedings were any matters discussed as to which the defendant could have been of any aid to his counsel, and each concerned only questions of law).

As to the hearing on the appellant's motion to produce, from which the State concedes the appellant was absent, the State argues that defense counsel waived the appellant's right to be present, stating that her presence was not necessary to hear the legal arguments. The record indicates that, prior to beginning the hearing, the trial court asked defense counsel, "Do you waive your client's presence here for this hearing?" Defense counsel responded, "Yes, Your Honor. Apparently I'll have to – she's in the Elmore County jail. I did not have time to get her here." Defense counsel thereafter stated, "Your Honor, I don't think it's necessary for her to be here, to hear legal arguments on this point." During this hearing, the defense requested the production of certain telephone conversations from the appellant's house to the police

questions of State's witness Freddie Patterson concerning his prior criminal record.

department. The trial court denied this request as to all the conversations, but ordered the State to turn over any exculpatory material contained in those conversations. The defense also requested the production of tape-recorded statements by the defendant, which request the trial court granted. The defense also asked for production of any statements, including grand jury testimony, of certain State's witnesses who were not accomplices. The trial court denied this request as to all statements, but ordered the State to turn over any exculpatory material contained in the witnesses' statements.

We decline to hold, in the present case, that defense counsel could waive the appellant's right to be present. See *Proffitt v. Wainwright*, supra.[3] However, because the hearing involved only questions of law, the appellant's presence would have been needless. Moreover, in light of the trial court's favorable rulings for the appellant, she was not prejudiced by her absence. See *State v. Iverson*, 187 N.W.2d 1 (N.D.), cert. denied, 404 U.S. 956, 92 S.Ct. 322, 30 L.Ed.2d 273 (1971) (wherein, although the court found error in the defendant's absence from four conferences held in chambers, the court held that the error was

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[3] In *Proffitt v. Wainwright*, the court held that the trial court erred in allowing a post-trial sentencing hearing to be conducted in the defendant's absence after a purported waiver of his presence by defense counsel. The court held that, even if it were to follow the cases cited by the State for a departure from the no-waiver rule, at least a "knowing and voluntary consent" would be required and, because the defendant was neither apprised of the hearing nor afforded an opportunity to assert his right to attend, he could not have knowingly or voluntarily waived his right to be present.

harmless, emphasizing that in three of the conferences the defendant obtained favorable evidentiary rulings).

V

The appellant argues that the trial court erred in denying her motion for a change of venue. The record indicates that, prior to trial, a hearing was held on the appellant's motion for a change of venue, during which an investigator testified for the appellant. He stated that he had taken a survey of 25 to 30 people in different areas of Montgomery County. He testified that he had driven around the county, stopping at various locations, and that he had attempted to question different type of people. He admitted that his survey was informal and unscientific and that he had no specialized training or polling skills. He testified that his findings revealed that 35% to 40% of the people questioned had a fixed opinion as to the appellant's guilt. The appellant offered no further evidence in support of her motion. This showing was not sufficient to prove that the community was saturated with prejudicial publicity.

> "Absent a showing of abuse of discretion, a trial court's ruling on a motion for change of venue will not be overturned. *Ex parte Magwood*, 426 So.2d 929, 931 (Ala.), *cert. denied*, 462 U.S. 1124, 103 S.Ct. 3097, 77 L.Ed.2d 1355 (1983). In order to grant a motion for change of venue, the defendant must prove that there existed actual prejudice against the defendant or that the community was saturated with prejudicial publicity. *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); *Franklin v. State*, 424 So.2d 1353 (Ala.Crim.App.1982). Newspaper articles or widespread publicity, without more, are

insufficient to grant a motion for change of venue. *Anderson v. State*, 362 So.2d 1296, 1298 (Ala.Crim.App.1978). As the Supreme Court explained in *Irvin v. Dowd*, 366 U.S. 717, 723, 81 S.Ct. 1639, 1642-43, 6 L.Ed.2d 751 (1961):

> " 'To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. . . . '

"The standard of fairness does not require jurors to be totally ignorant of the facts and issues involved. *Murphy v. Florida*, 421 U.S. 794, 799-800, 95 S.Ct. 2031, 2035-2036, 44 L.Ed.2d 589 (1975). Thus, '[t]he proper manner for ascertaining whether adverse publicity may have biased the prospective jurors is through the voir dire examination.' *Anderson v. State*, 362 So.2d 1296, 1299 (Ala.Crim.App.1978)."

Ex parte Grayson, 479 So.2d 76, 80 (Ala. 1985), cert. denied, 474 U.S. 865, 106 S.Ct. 189, 88 L.Ed.2d 157 (1985).

Moreover, the appellant has failed to prove that there existed any actual prejudice against her. The jurors who indicate that they had any knowledge of the case were questioned individually concerning the extent of their knowledge, the source of that knowledge, and the ability to disregard the information and decide the case based upon the facts presented in court. No juror remaining on the venire indicated that he or she could not decide the case based on the facts presented and on the law as

instructed by the court. Thus, there was no actual prejudice demonstrated by the appellant resulting from pretrial publicity. *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961).

Although the appellant further claims error in the trial court's failure to allow individual voir dire of every potential juror, individual voir dire was undertaken where there was any reason for follow-up, including any indication of pre-trial knowledge of the case. Whether a capital defendant is allowed individual voir dire of each prospective juror is a matter vested within the discretion of the trial court. *Hallford v. State*, 548 So.2d 526, 538-39 (Ala.Cr.App.1988), affirmed, 548 So.2d 547 (Ala.), cert. denied, 493 U.S. 945, 110 S.Ct. 354, 107 L.Ed.2d 342 (1989). We find no abuse of discretion in this case. *Kuenzel v. State*, 577 So.2d 474, 484 (Ala.Cr.App.1990), affirmed, 577 So.2d 531 (Ala.1991), cert. denied, ___ U.S. ___, 112 S.Ct. 242, 116 L.Ed.2d 197 (1991).

The appellant also claims that the trial court erred in denying her request to have the venire complete a questionnaire. However, "the trial court has discretion regarding how the voir dire examination of juror will be conducted, and . . . reversal can be predicated only upon an abuse of that discretion." *Bui v. State*, 551 So.2d 1094, 1110 (Ala.Cr.App.1988), affirmed, 551 So.2d 1125 (Ala.1989), vacated on other grounds, 499 U.S. 971, 111 S.Ct. 1613, 113 L.Ed.2d 712 (1991). There was no abuse of discretion by the trial court as to this matter.

The appellant further claims that the trial court erred in failing to ask potential jurors whether any of them had fixed opinions in favor of the death sentence. However, it

should be noted that this jury returned a sentence of life without parole, and the rule established in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), does not apply where the jury does not recommend the death penalty. See *Neelley v. State*, 494 So.2d 669, 680 (Ala.Cr.App.1985), affirmed, 494 So.2d 697 (Ala.1986), cert. denied, 480 U.S. 926, 107 S.Ct. 1389, 94 L.Ed.2d 702 (1987); *Bumper v. North Carolina*, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968). Moreover, because the appellant failed to object to the trial court's failure to question the jurors, this alleged error would have to amount to plain error for the appellant to be entitled to relief. However, this court has held that the failure of the trial court to question potential jurors concerning their views in favor of the death penalty does not constitute plain error. *Henderson v. State*, 583 So.2d 276 (Ala.Cr.App.1990), affirmed, 583 So.2d 305 (Ala.1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1268, 117 L.Ed.2d 496 (1992).

VI

The appellant argues that it was error for sheriff's deputies to manage and be in charge of the jurors during their sequestration and deliberations, in light of the fact that the victim was a deputy sheriff. The record reveals that the appellant objected on this ground at trial, and that the trial court responded that the deputies had long been assigned to court detail and that the trial court was familiar with them. The trial court further state that the deputies were "well aware of their responsibilities." There is no indication or claim by the appellant of any improper behavior by the deputies in this regard or of any improper communications between the deputies and

the jury. Thus, there is no evidence of prejudice to the appellant.

In *Holloway v. State*, 477 So.2d 487 (Ala.Cr.App.1985), overruled on other grounds, *Ex parte McCree*, 554 So.2d 336 (Ala.1988) a manslaughter case, the defendant argued that because the sheriff and several deputies were witnesses for the State, the trial court should not have allowed the sheriff's department to manage the jury and to sequester them. In that case, this court noted that there was no evidence of prejudice to the defendant. This court held:

> " 'Reversible error will not be presumed, but the burden is upon the appellant to show injury in this respect.' *Bowens v. State*, 54 Ala.App. 491, 309 So.2d 844 (1974), cert. denied, 293 Ala. 746, 309 So.2d 850 (1975).
>
> "Section 12-16-10, Code of Alabama 1975, establishes the duty of the sheriff to provide suitable lodging and meals for members of a sequestered jury. Furthermore, the sheriff and deputies are the proper officers to have charge of the jurors during their deliberations, and that includes the rendering of such services to them as their physical conditions require. *Pounders v. State*, 55 Ala.App. 204, 314 So.2d 123 (1975)."

Holloway v. State, supra, at 488. Because there is no indication of any prejudice to the appellant in the deputies' overseeing of the jury, we find no error as to this matter.

VII

The appellant argues that the trial court erred in denying her challenges for cause of three veniremembers

who indicated that they had knowledge of the case from pretrial publicity, as well as her challenge of another veniremember who knew the victim. Each of the three veniremembers who had knowledge of the case from pretrial publicity was questioned individually by the trial court concerning this knowledge. All three stated that they only remembered the basic facts of the case, and two of the three specifically testified that they tended not to believe what they heard through the media. All three potential jurors stated that they had no doubts that they could render a fair, just, and impartial verdict based on the facts presented in court and the law as instructed by the trial court. The mere knowledge of the facts and issues in this case, as in any case, does not disqualify a potential juror from serving on the case. *Kinder v. State*, 515 So.2d 55, 59-61 (Ala.Cr.App.1987). See also *Kuenzel v. State*, supra, at 483-84. The appellant also alleges error in the trial court's refusal to excuse for cause a potential juror who knew the victim personally and professionally and who was also familiar with the facts and circumstances of the crime. The following transpired during the individual voir dire of this prospective juror:

"THE COURT: [Prospective juror], you had indicated that you had either read or heard or seen something about this matter in the past; is that correct?

"PROSPECTIVE JUROR: Yes, sir.

"THE COURT: Could you, the best you can recall, tell us what you know about it and from what source, what you heard, what you read, what you saw?

"PROSPECTIVE JUROR: Well, mainly, you know, from what I read in newspaper accounts and [television] accounts. Also, Judge, there's one thing I don't think you asked this morning, I don't know the significance of it but it may be, but from a professional point of view I knew Mr. Harris.

"THE COURT: Okay. Can you tell us how you knew him?

"PROSPECTIVE JUROR: He used to bring inmates to Kilby and as a correctional officer we had a relationship there.

"THE COURT: Okay.

"PROSPECTIVE JUROR: And also, two or three, I would think two or three occasions I might have been with him socially.

"THE COURT: Okay. What type of social?

"PROSPECTIVE JUROR: Just, you know, get together like I think he was a retired military, so am I. I think one occasion I met him at the club. Another occasion I think there was some correctional officers getting together. He was on the scene, you know, just for a social affair.

"THE COURT: Do you feel that personal acquaintance with him –

"PROSPECTIVE JUROR: I didn't know him personally, per se. I just, you know, just, as I say, just a relationship we had on those occasions.

"THE COURT: Do you feel like whatever relationship –

"PROSPECTIVE JUROR: No, sir.

"THE COURT: – You have with him would in any way affect your ability to render a fair, just, and impartial verdict from this case?

"PROSPECTIVE JUROR: No, sir, I don't think it has any bearing. I just wanted to tell you so it wouldn't come up later.

"THE COURT: I appreciate you telling us.

"PROSPECTIVE JUROR: But it had no bearing on my making a judgment fairly, a fair decision.

"THE COURT: Do you recall what you read in the newspaper accounts about this or heard on t.v.?

"PROSPECTIVE JUROR: Just the incident itself.

"THE COURT: What about it?

"PROSPECTIVE JUROR: The fact that they had found his car on the side of the road and, um, he was on his way to work, basically.

"THE COURT: Do you recall anything about who may have been arrested for it, or who was alleged –

"PROSPECTIVE JUROR: Yes, sir, they did indicate at a later date that his wife and some other people, I don't recall the names –

"THE COURT: Ym-hum.

"PROSPECTIVE JUROR: – Have been implicated.

"THE COURT: Based on what you may have read or heard do you feel like you'd be able to put that aside and listen only to the facts as you hear them in Court?

"PROSPECTIVE JUROR: Yes, sir.

"THE COURT: And render a fair, just, and impartial verdict?

"PROSPECTIVE JUROR: Yes, sir.

"THE COURT: Do you feel like you'd be tainted in any way based on what you've read or heard in the past about this?

"PROSPECTIVE JUROR: No, sir, none whatsoever.

"THE COURT: So you have no doubt that you can be fair in this case?

"PROSPECTIVE JUROR: Yes, sir."

"The facts that the victim and a prospective juror are personally acquainted and work for the same company do not automatically disqualify a juror for cause (cite omitted). Employment of the juror by the same company that employed the victim is not a prima facie indication of interest or bias on the part of the juror." *Carlton v. State*, 415 So.2d 1241, 1242 (Ala.Cr.App.1982), citing *Glenn v. State*, 395 So.2d 102, 107 (Ala.Cr.App.1980), cert. denied, 395 So.2d 110 (Ala.1981).

> "The grounds on which a juror may be challenged for cause are set out in § 12-16-150, *Code of Alabama* (1975). . . . Furthermore, grounds for challenge for cause under the common law still exist where they are not inconsistent with § 12-16-150. *Stewart v. State*, 405 So.2d 402, 407 (Ala.Cr.App.1981); *Felton v. State*, 46 Ala. App. 579, 246 So.2d 467 (1971); *Mullis v. State*, 258 Ala. 309, 62 So.2d 451 (1952).
>
> " 'The test to be applied is can the juror eliminate the influence of his scruples and

render a verdict according to the evidence. Ordinarily a juror is not disqualified where it appears that he is willing to follow the instructions of law given by the trial court and is able to decide the case impartially according to the evidence notwithstanding his scruples. The determination of this question is based on the juror's answers and demeanor and is within the sound discretion of the trial judge. *Tidmore [v. City of Birmingham*, 356 So.2d 231 (Ala.Cr.App.1977), *cert. denied*, 356 So.2d 234 (Ala.1978)]. A juror is incompetent whose answers show that he would follow his own views regardless of the instructions of the court. *Watwood v. State*, 389 So.2d 549, 550 (Ala.Cr.App.), *cert. denied*, 389 So.2d 552 (Ala.1980).

"*Barbee v. State*, 395 So.2d 1128, 1130-31 (Ala.Cr.App.1981). . . .

> " 'Thus, where a juror states that he has opinions but that he would try the case fairly and impartially according to the law and the evidence and that he would not allow his opinion to influence his decision, it is not error for a trial judge to deny a challenge for cause. *Howard v. State*, 420 So.2d 828, 831 (Ala.Cr.App.1982). "A juror who brings his thoughts out into the open in response to voir dire questions may be the one who later 'bends over backwards' to be fair. . . . " *Clark v. State*, 443 So.2d 1287, 1289 (Ala.Cr.App.1983).' "*Mahan v. State*, 508 So.2d 1180 (Ala.Cr.App. 1986)."

Kinder v. State, 515 So.2d 55, 60-61 (Ala.Cr.App.1986).

Because this potential juror stated that he would base his decision on the evidence presented at trial and on the judge's instructions as to the law, we find no abuse of discretion by the trial court in denying the appellant's challenge for cause of this potential juror. "A trial court's ruling on challenges for cause based on bias is entitled to great weight and will not be disturbed on appeal unless clearly shown to be an abuse of discretion." *Stewart v. State*, 405 So.2d 402, 408 (Ala.Cr.App.1981).

VIII

The appellant argues that the trial court erred in limiting her cross-examination of a State's witness concerning an alleged prior conviction and probationary status, which she contends violated her Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution and Alabama law. The appellant refers to State's witness Alonzo Trimble, who testified that he worked with Lorenzo McCarter and that he was approached by him and solicited to commit the murder.

The record reveals that, during the cross-examination of Trimble, defense counsel asked if the witness was still on probation. The witness responded that he was not. The prosecutor then asked that the question and answer be stricken, as there was "no basis whatsoever for [the defense counsel's] asking that question." The prosecutor indicated that she had no knowledge that the witness had ever been on probation, and defense counsel responded that the defense had been informed that the witness was on probation. Thereafter, a hearing was held in chambers and the prosecutor again asserted that defense counsel

had no basis for his question and was merely conducting a "fishing expedition." When defense counsel was asked by the trial court if he had information that the witness was on probation, he responded:

> "I don't know whether he is or not, Judge. I just don't know. They haven't furnished us a rap sheet on him. [The prosecutor] says she doesn't have it in her file and I believe her, you know. It's our understanding that he's convicted of an offense and was on probation. Maybe it was at the time he gave the statements. Maybe he's not any longer. I don't see why we don't just ask him."

The prosecutor responded that the question had been asked and answered, but complained that the question had implied that he may have been on probation, so the damage had been done. Thereafter, Trimble was called into chambers and asked by the trial court if he had ever been convicted of a crime involving moral turpitude. The witness responded that "they" tried to convict him of "a stolen vehicle"; however, he indicated he was never convicted. The witness then stated that he had been charged with third degree assault in municipal court about three months prior to the instant trial. He responded that those charges were brought after his involvement in the present case. Subsequently, while the parties were still in chambers, an assistant prosecutor asked the witness if he had ever been on probation. The witness responded that he had been on unsupervised probation but that he never had a probation officer. The following then transpired:

> "THE COURT: What were you on unsupervised probation for?

> "THE WITNESS: They had tried to accuse me [of] stealing a truck, but I didn't get no – I didn't do any time behind it.
>
> "THE COURT: I didn't ask you if you'd done any time. How were you on unsupervised probation? You can't be on any kind of probation unless you're convicted.
>
> "THE WITNESS: I was under the custody of my mother for a certain period of time and not getting in any kind of trouble.
>
> "THE COURT: How old were you?
>
> "THE WITNESS: Um, I think I was twenty-seven when it happened.
>
> "THE COURT: How long ago was that?
>
> "THE WITNESS: It's been about a year, maybe two years.
>
> "THE COURT: Was that during the period of time this all was going on?
>
> "THE WITNESS: Yeah, it was.
>
> "THE COURT: Who put you on unsupervised probation?
>
> "THE WITNESS: My lawyer was, um, Mr. Brooks.
>
> "[PROSECUTOR]: I don't believe it.
>
> "THE COURT: Well, who put you on unsupervised probation?
>
> "THE WITNESS: The judge.
>
> "THE COURT: What judge?
>
> "THE WITNESS: Um, I can't recall his name cause it was in Tuskegee.

"THE COURT: So you're telling the Court you were on unsupervised probation for stealing a car?

"THE WITNESS: They said I stole it but they found out, you know, I didn't steal the car. Okay. The damage that was [done] to the car, we agreed I paid the damage that was [done] on the car and I paid for the damage and they told me, you know, I was in custody of my mother, you know, for a certain period of time till I paid the money and after I paid the money.

"THE COURT: Why did you pay the damage if you didn't steal the car?

"THE WITNESS: Well, the car was in my hands at the time and the car got away from me and I was [held] responsible for it cause the keys [were given] to me.

"THE COURT: By who? The owner of the car?

"THE WITNESS: The owner.

"THE COURT: That's about as far a I know to go to find out.

"[DEFENSE COUNSEL]: Is my question proper now, Your Honor?

"THE COURT: I don't know whether it is or it isn't based on what he is saying."

Thereafter, when cross-examination was continued in the presence of the jury, the following transpired:

"Q. Mr. Trimble, have you been convicted of a crime involving moral turpitude?

"[PROSECUTOR]: Object, Your Honor. McElroy's is clear that's not the way to ask

the question. Must be specific about the crime itself.

"THE COURT: Lay your predicate.

"Q. Have you been convicted of a crime of moral turpitude concerning a theft of an automobile?

"[PROSECUTOR]: Objection, Your Honor. That's improper way to ask it and I cite the Court to McElroy's at section –

"THE COURT: Overruled. You may answer.

"Q. Mr. Trimble?

"A. Repeat that again?

"Q. Yes, sir. Have you been convicted of a crime involving moral turpitude concerning the theft of an automobile?

"A. Yes. I have.

"Q. Okay. And were you convicted of that, oh, about a year ago in Tuskegee?

"A. Yes.

"Q. All right. And were you put on probation?

"A. I didn't have a probation officer.

"[PROSECUTOR]: Objection, Your Honor. He's going too far now.

"THE COURT: Sustained.

"(WHEREUPON, the following occurred at the bench:)

"[DEFENSE COUNSEL]: Judge, it was my understanding the ruling was changed.

Once we showed the offense we would be allowed to show he was on probation. He admitted the offense, he admitted the theft of – moral turpitude involving theft of an automobile and I'd like to show he was on probation at this time.

"[PROSECUTOR]: Judge, not under impeachment.

"THE COURT: For what purpose?

"[DEFENSE COUNSEL]: To impeach these statements, his testimony here to day.

"THE COURT: How?

"[DEFENSE COUNSEL]: I think it shows he would be inclined to cooperate with the State.

"THE COURT: Sustain the objection unless you show me some law.

"[DEFENSE COUNSEL]: Okay. Thank you."

Thereafter, during the defense counsel's closing argument, he argued to the jury that Trimble's alleged conviction and probation provided the motive and bias for his testimony against the appellant.

In the present case, whether the witness was placed on probation arising out of a conviction in another county, i.e., Macon County, does not indicate possible bias in testifying for the State in a case arising out of Montgomery County.

> " 'It is generally held, even in jurisdictions where such evidence is not ordinarily admissible, that the fact that a witness has been arrested or charged with crime may be shown or

> inquired into where it would reasonably tend to show that his testimony might be influenced by interest, bias, or a motive to testify falsely. This principle has been held applicable in cases where criminal charges are pending in the same court against a witness for the prosecution in a criminal case at the time he testifies, as a circumstance tending to show that his testimony is or may be influenced by the expectation or hope that, by aiding in the conviction of the defendant, he would be granted immunity or rewarded by leniency in the disposition of his own case. But it has been held that the pendency of charges against the witness in another county or jurisdiction cannot be shown under this theory of admissibility.' "

Woodard v. State, 489 So.2d 1, 2-3 (Ala.Cr. App. 1986), quoting 81 Am.Jr.2d *Witnesses* § 589, at pp. 597-98 (1976).

Because the district attorney's office in Montgomery County could not have made any recommendations toward his sentencing in Macon County, the appellant could not have been helped by testifying in the present case. Nor is there any indication in the record that he was promised any help. Therefore, because the "extent of cross-examination on irrelevant facts, for the purpose of testing bias or credibility of the witness's testimony, is a matter resting largely in the discretion of the trial court, [whose] ruling will not be disturbed unless it appears that it has abused its discretion to the prejudice of the complaining party," *Beavers v. State*, 565 So.2d 688, 689-90 (Ala.Cr.App.1990), we find no error in the instant case.

IX

The appellant argues that Trimble's testimony concerning out-of-court statements made to him by Lorenzo McCarter and by the appellant constituted inadmissible hearsay. During the trial, when the appellant objected to the admission of these statements on this ground, the prosecutor responded that the statements were admissible pursuant to the coconspirator exception to the hearsay rule. On appeal, as he did at trial, the appellant argues that the State did not establish the existence of a conspiracy prior to admitting these statements, and that, therefore, the exception did not and does not apply in the present case.

> " 'Where proof of a conspiracy exists, any act or statement made by an accused's co-conspirator in the commission of the crime, done or made before the commission of the crime, during the existence of the conspiracy and in furtherance of a plan or design is admissible against the accused.' *Lewis v. State,* 414 So.2d 135, 140 (Ala.Crim.App.), *cert. denied,* 414 So.2d 140 (Ala.1982). *See also Nance v. State,* 424 So.2d 1358 (Ala.Crim.App.1982). Statements of a co-conspirator may be admitted against another co-conspirator when the State presents prima facie evidence of the existence of a conspiracy. *Lewis.* It is well settled that a conspiracy need not be proved by direct and positive evidence and may be proved by circumstantial evidence. *Lewis; Stinson v. State,* 401 So.2d 257 (Ala.Crim.App.), *cert. denied,* 401 So.2d 262 (Ala.1981). In determining whether the State presented a prima facie case, this court will consider the evidence

> in the light most favorable to the State. *Hutcherson v. State,* 441 So.2d 1048 (Ala.Crim.App.1983); *Smelcher v. State,* 385 So.2d 653 (Ala.Crim.App.1980)."

Salter v. State, 578 So.2d 1092, 1094 (Ala.Cr.App.1990), writ denied, 578 So.2d 1097 (Ala. 1991).

If the State presented sufficient evidence that McCarter and the appellant were involved in the conspiracy, evidence of McCarter's statements was admissible against the appellant, regardless of whether the prima facie showing of the existence of the conspiracy was made prior to the admission of the statements. The order of proof in this context is not a legal requisite.

> "While it is preferable that a co-conspirator testify after the prima facie showing of the existence of a conspiracy, such order of proof is not mandatory. The order of proof requirement is for the purpose of expediting the trial and saving the valuable time of the trial court, rather than protecting or securing any supposed right a defendant might have. *Morton v. State,* 338 So.2d 423, 425 (Ala.Cr.App.), *cert. denied,* 338 So.2d 428 (Ala.1976); *Conley [v. State,* 354 So.2d 1172 (Ala.Cr.App.1977)]."

Nance v. State, 424 So.2d 1358, 1365 (Ala.Cr.App.1982).

> "Furthermore, '[e]ven if testimony relating statements made by confederates is objectionable as premature, in that independent proof of conspiracy has not been established before its admittance, subsequent proof of the conspiracy cures any error in the premature admission. *Conley v. State,* 354 So.2d 1172 (Ala.Cr.App.1977).' *Tucker v. State,* 454 So.2d 541, 546-47 (Ala.Cr.App.1983), reversed on

other grounds, *Ex parte Tucker*, 454 So.2d 552 (Ala.1984)."

Creech v. State, 508 So.2d 302, 304 (Ala.Cr.App.1987). See also *Inzer v. State*, 447 So.2d 838, 848-49 (Ala.Cr.App.1983), cert. denied, 447 So.2d 850 (Ala.1984).

In the present case, prior to Trimble's testimony, the State introduced a witness's testimony that McCarter, Hood, and Sockwell were all present and all aided in the commission of the murder. The witness further testified that a female called McCarter's beeper just prior to the victim's death, stating that the victim was leaving. The State also presented testimony to the effect that McCarter and the appellant were sexually involved and that, when asked if McCarter could have committed the offense, the appellant responded that, "If he did kill him, I did not tell him to." There was further circumstantial evidence concerning the appellant's behavior upon learning that her husband was missing and, thereafter, dead. The appellant was able to become extremely calm for questioning, she gave a tour of her home to one of the officers, and, when asked how she was able to remain so calm, she acknowledged that she and the victim were experiencing marital problems and that he drank excessively and abused her. Thereafter, Trimble testified that, while he was at work with McCarter, McCarter got beeped and went to answer the call. McCarter then called Trimble to the telephone, saying that someone wanted to speak to him. Trimble testified that the person on the telephone identified herself as Louise Harris and that she told him that she needed "someone to do a job." She further stated that she was referring to killing someone, and that the job had to be done prior to Friday because the victim was "spending

into some of the insurance money and he was adding onto the house." Trimble testified that he recognized the voice as that of Louise Harris, whom he had met on previous occasions.

Because the conspiracy was clearly proved by the State, McCarter's statements to Trimble, asking him to commit the murder or to find someone who would commit the murder, were admissible. Harris's statement was admissible as an admission. See C. Gamble, *McElroys' Alabama Evidence* (4th Ed.1991) § 264.01(1).

X

The appellant argues that her conviction and sentence were obtained by emotional appeals to the suffering of the victim's family in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Specifically, she argues that the trial court erred by allowing the victim's sister to sit at the table for the prosecution during trial, and she claims that § 15-14-55, *Code of Alabama* 1975, which permits a victim's family member to sit at the table for the prosecution at trial, is unconstitutional in the context of a capital case. The appellant also argues the trial court erred by allowing the victim's sister to take the stand and to testify about allegedly irrelevant matters, and by allowing the State to otherwise emphasize the presence and suffering of the victim's family members. She also argues that the State sought to obtain a verdict and a sentence based on the victim's characteristics. The appellant cites to *South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d

876 (1989), and *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987).

The appellant's arguments, based on *South Carolina v. Gathers* and *Booth v. Maryland* must fail because both of these cases were specifically overruled by the United States Supreme Court in *Payne v. Tennessee*, ___ U.S. ___, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). See *Smith v. State*, 588 So.2d 561 (Ala.Cr.App.1991). See also *McWilliams v. State*, [Ms. 6 Div. 190, August 23, 1991] ___ So.2d ___ (Ala.Cr.App.1991).

The appellant's arguments concerning presence at the table for the prosecution of the victim's sister have been previously addressed by this court in *Henderson v. State*, 583 So.2d 276 (Ala.Cr.App.1990), affirmed, 583 So.2d 305 (Ala.1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1268, 117 L.Ed.2d 496 (1992).

> "The presence of a victim seated at the counsel table for the prosecution is specifically provided for by 'the Alabama Crime Victims' Court Attendance Act,' codified at §§ 15-14-50 *et seq.*, *Code of Alabama* 1975. This act gives victims of a criminal offense the right to be present in the courtroom and seated alongside the prosecutor during the trial of the individual charged with that offense.
>
> "The appellant argues, however, that this statute is unconstitutional generally, or alternatively, with regard to capital murder cases specifically. This argument has been previously addressed – and rejected – by this Court in both capital as well as non-capital cases. In *Crowe v. State*, 485 So.2d 351, 362-63 (Ala.Cr.App.1984), *reversed on other grounds*, 485 So.2d 373

(Ala.1985), *cert. denied*, 477 U.S. 909, 106 S.Ct. 3284, 91 L.Ed.2d 573 (1986), a capital murder case in which the death penalty was imposed, this Court specifically rejected the notion that the seating of the victim's widow at counsel table for the prosecution violated any constitutional rights of the accused. Likewise, in *Anderson v. State*, 542 So.2d 292, 304-05 (Ala.Cr.App.1987), *writ quashed*, 542 So.2d 307 (Ala.1989), cert. denied, 493 U.S. 836, 110 S.Ct. 116, 107 L.Ed.2d 77 (1989), a capital murder case in which life imprisonment without possibility of parole was imposed, we rejected this argument, holding as follows:

> " 'Furthermore, under § 15-14-55, *Code of Alabama* (1975), "a victim of a criminal offense shall be exempt from the operation of rule of court, regulation, or statute or other law requiring separation or exclusion of witnesses from court in criminal trials or hearings." Under § 15-14-56(a), "[w]henever a victim is unable to attend such trial or hearing or any portion thereof by reason of death . . . the victim's family may select a representative who shall be entitled to exercise any right granted to the victim, pursuant to the provisions of this article." . . . ' "

Id. at 285-86. Therefore, the presence of the victim's family and evidence of victim impact did not constitute error.

Moreover, the appellant argues that the prosecutor erred by dwelling on and emphasizing the victim's role as a deputy sheriff, thereby prejudicing her case pursuant to *Booth v. Maryland*, supra and *South Carolina v. Gathers*, supra. However, as previously noted, these cases were overruled by *Payne v. Tennessee*, supra. Furthermore, the

testimony concerning the victim's role as a police officer was relevant to the State's evidence presented during the guilt phase, as this case was initially brought on two counts, the second of which charged the appellant with the capital murder of a law enforcement officer. § 13A-5-40(a)(5), *Code of Alabama* 1975.

XI

The appellant argues that her statements made to officers investigating her husband's death on the night of the murder were inadmissible, because, she argues, they were taken in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments and of the constitution of the State of Alabama. Specifically, the appellant argues that the statements she made to her husband's coworkers should have been held inadmissible because, she says, she was never given the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). However, the record indicates that the appellant was not subjected to a custodial interrogation so as to trigger the safeguards of *Miranda v. Arizona*, supra. When the appellant made these statements, she was present in her home, and the officers were there to inform her of her husband's death and to investigate any leads that the appellant may be able to provide, as well as to determine whether the victim had any weapons at his home. The appellant's body had just been discovered, and the officers had no reason to suspect that the appellant was in any way connected with the death.

> "[C]ompliance with the procedural safeguards of *Miranda* is not necessary unless the confession is a product of 'custodial interrogation' or

> 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' *Id.* at 444, 86 S.Ct. at 1612 (footnote omitted). 'It is settled that the safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to a "degree associated with formal arrest." ' *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S.Ct. 3138, 3150, 82 L.Ed.2d 317 (1984) (*quoting California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983) (*per curiam*)). The Supreme Court reiterated the reasons for the *Miranda* safeguard in *Minnesota v. Murphy*, 465 U.S. 420, 429-30, 104 S.Ct. 1136, 1143-44, 79 L.Ed.2d 409 (1984), as follows:
>
> > " 'Not only is custodial interrogation ordinarily conducted by officers who are "acutely aware of the potentially incriminatory nature of the disclosures sought," *Garner v. United States*, [424 U.S. 648], at 657 [96 S.Ct. 1178 at 1184, 47 L.Ed.2d 370] [1976], but also the custodial setting is thought to contain "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda v. Arizona*, 384 U.S. at 467 [86 S.Ct. at 1624]. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 246-247 [93 S.Ct. 2041, 2057-2058, 36 L.Ed.2d 854] (1973). To dissipate "the overbearing compulsion . . . caused by isolation of a suspect in police custody," *United States v. Washington*, 431 U.S. 181, 187, n. 5, [97 S.Ct. 1814, 1819 n. 5, 52 L.Ed.2d 238] (1977), the *Miranda* court required the exclusion of incriminating statements obtained

during custodial interrogation unless the suspect fails to claim the Fifth Amendment privilege after being suitably warned of his right to remain silent and of the consequences of his failure to assert it. 384 U.S., at 467-469, 475-477 [86 S.Ct. at 1624-1625, 1628-1629]. We have consistently held, however, that this extraordinary safeguard "does not apply outside the context of the inherently coercive custodial interrogations for which it was designed." *Roberts v. United States*, 445 U.S. [552] at 560 [100 S.Ct. 1358 at 1364, 63 L.Ed.2d 622] [1980].'

"It is the compulsive aspect of custodial interrogation, and not the strength or content of the officer's suspicion at the time the questioning was conducted, which led the Court to impose the *Miranda* requirements with regard to custodial questioning. *Beckwith v. United States*, 425 U.S. 341, 346-47, 96 S.Ct. 1612, 1616, 48 L.Ed.2d 1 (1976). . . .

". . . .

"Among the factors to be considered in making this determination are whether the suspect was questioned in familiar or, at least, neutral surroundings; the number of law enforcement officers present at the scene; the degree of physical restraint of the suspect; the duration and character of the questioning; and how the suspect got to the place of questioning. *See* 1 LaFave and Israel, *supra*, at § 6.6(c).Other pertinent factors are the language used to summon the individual; the extent to which the person is confronted with evidence of guilt; and the degree of pressure applied to detain the individual. *Hooks v. State*, slip op. at 36 [534 So.

2d 329 at 348] (*quoting United States v. Wauneka*, 770 F.2d 1434, 1438 (9th Cir.1985)). Furthermore, '[b]ecause the Court in *Miranda* expressed concern with the coerciveness of situations in which the suspect was "cut off from the outside world" and "surrounded by antagonistic forces" in a "police dominated atmosphere" and interrogated "without relent," circumstances relating to those kinds of concerns are also relevant on the custody issue.' 1 LaFave and Israel, *supra*, at § 6.6(f).

"In regard to the 'very significant factor' of the place of the interrogation, *id.*, it has been observed that 'courts are much less likely to find the circumstances custodial when the interrogation occurs in familiar or at least neutral surroundings.' *Id.* at 6.6(e). The underlying rationale is that since the suspect is in familiar surroundings, he is not subjected to the same pressures as in the police-dominated atmosphere of the police station. *Id.*

"465 U.S. at 433, 104 S.Ct. at 1145 (footnote omitted)."

Finch v. State, 518 So.2d 864, 867-69 (Ala.Cr.App.1987).

In the present case, the appellant was questioned in her home by officers, some of whom had known the appellant socially. The appellant was not a suspect at the time and was not in any way restrained. She could not have reasonably believed that she was in custody. Any statements or comments that she made were willingly volunteered, within the protection of her own home.

XII

The appellant argues that the trial court erred in restricting his cross-examination of Freddie Patterson, who was present in the car with Lorenzo McCarter, Michael Sockwell, and Alex Hood when the victim was shot. Patterson was not charged in the present case, and the State presented evidence that he had no knowledge of the planned murder. The appellant argues that she should have been allowed to question the witness concerning an unrelated felony charge, which was pending against him at the time he was brought in for questioning in the present case. Patterson later pleaded guilty to a misdemeanor on this charge. The appellant argued that she had the right to question Patterson concerning this charge, as well as his other arrests and convictions, in order to demonstrate bias or self-interest.

The record reveals that, during the direct examination of Patterson, he testified that he went to the police station to talk to an officer concerning this case approximately four days after the other three men who had been present in the automobile had been arrested. He testified that he voluntarily went to the police department and "turned [himself] in and talked to them." He further testified that he was never charged in this case, but that, when he turned himself in, a charge of leaving the scene of an accident was pending against him in Montgomery County. He testified that he subsequently pleaded guilty to that charge. He further testified that he had been convicted of theft of property in the second degree, arising from an incident in Autauga County. Thereafter, during a conference outside the presence of the jury, the trial court held that the defense counsel would be allowed to

question the witness concerning the conviction in order to show possible bias and self-interest. However, he ruled that the defense counsel would not be allowed to go into the details of the unrelated offense. Defense counsel responded that he had no intention of so questioning the witness. During a later conference outside the hearing of the jury, defense counsel stated that he had a copy of Patterson's "rap sheet" and that he wished to question the witness concerning the convictions. Defense stated that he should be permitted to do so, because the State had previously "opened the door" to this subject by asking the witness whether he had ever been in trouble with the law. The trial court held that the State's question concerned felony convictions, and the trial court noted that he had "allowed you [the defense] to go into the – by prior ruling – to the leaving the scene of an accident, but I do not think that that opened it up to any other misdemeanor arrest and so forth and so on." Defense counsel responded:

> "We did not go into it. This is their question. The prosecution asked this question; we did not ask this question. We did not ask the question, and we think it's part of her constitutional rights, on her right of confrontation, her right of due process under protection of law to be able to go into the subject which the prosecution has raised, particularly on a key witness like this."

Moreover, the defense counsel was allowed to argue during his closing argument that the witness's involvement in the crime, arrest under suspicion of the charges, and prior convictions all tended to prove his bias and self-interest in testifying for the State.

> " ' "The scope of cross-examination in a criminal proceeding is within the discretion of the trial judge and it is not reviewable except for the trial judge's prejudicial abuse of discretion. *Jackson v. State*, Ala.Cr.App., 353 So.2d 40, cert. denied, 353 So.2d 48 (1977). *McFerrin v. State*, Ala.Cr.App., 339 So.2d 127 (1976). The right to a thorough and sifting cross-examination of a witness does not extend to matters that are collateral or immaterial and the trial judge is within his discretion in limiting questions which are of that nature. *McLaren v. State*, Ala.Cr.App., 353 So.2d 24, cert. denied, 353 So.2d 35 (1977); *McDonald v. State*, Ala.Cr.App., 340 So.2d 103 (1976)."
>
> " 'See also *Burton v. State*, 487 So.2d 951 (Ala.Cr.App.1984). While rather wide latitude is allowed on cross-examination, the court has reasonable discretion in confining the examination to prevent diversion to outside issues.' "

Steeley v. State, 662 So.2d 421 (Ala.Cr.App. 1992), quoting *Beavers v. State*, 565 So.2d 688, 690 (Ala.Cr.App.1990).

In *McMillian v. State*, 594 So.2d 1253 (Ala.Cr.App.1991), remanded on other grounds, 594 So.2d 1288 (Ala.1992) this court held that the trial court had not abused its discretion in limiting the defendant's cross-examination of a key State's witness, where the defendant had sought to ask the witness about the following subjects: how long he had spent in prison for a forgery conviction, "an unrelated pending murder case," and when the witness intended to meet with his attorney and enter his guilty plea in the instant case. This court held:

> "These questions sought to elicit collateral and irrelevant matter; therefore, the trial court did not abuse its discretion in sustaining the objections to them. The evidence of [the witness's] criminal record, which was substantial, was before the jury. The jury was made aware that he had been convicted and had served time for burglary, forgery, and theft. The jury was also aware that [the witness] had made a deal with the State to enter a plea of guilty to a lesser charge at a later time in return for his testimony."

McMillian v. State, supra, at 1261-62.

Even if the prosecutor, in fact, "opened the door" to the appellant's questions concerning these unrelated charges and convictions against the witness, and even in light of the witness's key role as one of the two main nonaccomplice witnesses against the appellant, any error in limiting this cross-examination was harmless.

> " '[A] party is given wide latitude on cross-examination to test a witness's partiality, bias, or interest.' *Perry v. Brakefield*, 534 So.2d 602, 608 (Ala.1988). The rule in this state, notwithstanding the general principle concerning the development of the interest or bias of a witness, is that the range of cross-examination rests largely in the discretion of the trial court and that the court's rulings will not be disturbed unless it clearly appears that the defendant was prejudiced by the rulings. However, 'where the witness' testimony is important to determination of the issues being tried, there is little, if any, discretion in the trial judge to disallow cross-examination on matters which tend to indicate the

bias of the witness.' Wells v. State, 292 Ala. 256, 258, 292 So.2d 471, 473 (1973).

" . . . ' "[T]he extent to which a witness may properly be cross-examined as to collateral circumstances for the purpose of showing bias depends in some instances upon the *importance of his testimony,* and especially upon whether such testimony is of a nature to be seriously affected by prejudice, bias, or hostility." ' *Louisville & N.R. v. Martin,* 240 Ala. 124, 131, 198 So. 141, 147 (1940) (emphasis in original). '[I]t is an abuse of discretion and a violation of constitutional rights to deny to a defendant the right to cross-examination a witness at all on a "subject matter relevant to the witness's credibility," such as the witness's possible motive for testifying falsely.' *United States v. Brown,* 546 F.2d 166, 169 (5th Cir.1977). . . .

". . . .

"Although we are extremely reluctant to hold that any improper limitation of cross-examination constitutes harmless error, we are convinced beyond any reasonable doubt that the error in this case did not contribute to the verdict of the jury. See *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Violations of the confrontation clause of the Sixth Amendment are subject to harmless error analysis. *Delaware v. Van Arsdall,* 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

" '[W]e hold that the constitutionally improper denial of the defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to *Chapman [v. California,* 386 U.S. 18, 87

S.Ct. 824], harmless-error analysis. The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. Those factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.'

"*Van Arsdall,* 475 U.S. at 684, 106 S.Ct. at 1438."

Hooper v. State, 585 So.2d 142, 145-46 (Ala.Cr.App.1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1295, 117 L.Ed.2d 517 (1992).

In the present case, in light of the overall strength of the prosecution's case, any error by the trial court in limiting this cross-examination was harmless because the witness admitted that he had been in trouble with the law and that he had a criminal record; and the appellant was allowed to cross-examine the witness concerning his previous conviction, which was pending at the time of his questioning.

XIII

The appellant argues that the State introduced and relied on prejudicial evidence of the appellant's bad character in order to obtain a conviction against her. Specifically, the appellant refers to evidence that she, a married woman, was having an affair with codefendant Lorenzo McCarter. The appellant argues that the probative value of this evidence was greatly outweighed by its prejudicial effect. However, it is clear from the record and from the evidence introduced at trial that the appellant's relationship with Lorenzo McCarter was the cornerstone of the conspiracy and established the motive for the murder.

> "In cases based largely on circumstantial evidence, a rather wide range of evidence is allowed in developing circumstances tending to show motive on the part of the accused. *Turner v. State*, 224 Ala. 5, 140 So. 447 (1931); *Chambliss v. State*, 373 So.2d 1185 (Ala.Cr.App.), *cert. denied*, 373 So.2d 1211 (Ala.1979). Where the evidence is in conflict as to whether the accused did the act, or is partially or wholly circumstantial upon that issue, the question of motive becomes a leading inquiry. *Harden v. State*, 211 Ala. 656, 101 So. 442 (1924). While not alone sufficient to justify a conviction, motive may strengthen circumstantial evidence. *Dolvin v. State*, 391 So.2d 666 (Ala.Cr.App.1979), *affirmed*, 391 So.2d 677 (Ala.1980). Evidence of a particular relationship between the accused and another person, when combined with other factors, may be relevant in proving motive and therefore be admissible. *Turner, supra.*
>
> "As our Supreme Court stated in *McDonald v. State*, 241 Ala. 172, 174, 1 So.2d 658 (1941):

> '*Testimony going to show motive*, though motive is not an element of the burden of proof resting on the State, *is always admissible.*' (Emphasis added.) And as we held in *Baalam v. State*, 17 Ala. 451, 453 (1850), 'When it is shown that a crime has been committed and the circumstances point to the accused as the guilty agent, then proof of a motive to commit the offense, though weak and inconclusive evidence, is nevertheless admissible.' See also *McClendon v. State*, 243 Ala. 218, 8 So.2d 883 (1942); *Spicer v. State*, 188 Ala. 9, 65 So. 972 (1914). Even slight evidence to show a motive for doing the act in a criminal case is not to be excluded, but should be left to the consideration of the jury. *Arnold v. State*, 18 Ala.App. 453, 93 So. 83 (1922).
>
> "Further in *Earnest v. State*, 21 Ala. App. 534, 536, 109 So. 613 (1926), the court held the following:
>
> > " '[I]t is permissible in every criminal case to show that there was an influence, an inducement, operating on the accused, which may have led or tempted him to commit the offense. It may spring from the lust of gain, or the gratification of an unlawful passion, from animosity, ill will, hatred, or revenge. The extent or magnitude of such motive, whether great or small, is also a proper inquiry. . . . ' "

Kelly v. State, 409 So.2d 909, 913-14 (Ala.Cr.App.1981) (wherein testimony of the defendant's involvement with a female employee was properly admitted as tending to show motive in a case of embezzlement).

Thus, in the present case, the evidence concerning the appellant's extramarital affair with one of her codefendants was relevant as evidence toward establishing the conspiracy and the motive for the murder.

XIV

The appellant argues that her rights under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and her rights under the Alabama constitution, were violated by the introduction of prejudicial and gruesome photographs of the deceased.

> "As a general rule, photographs are admissible in evidence if they tend to prove or disprove some disputed or material issue, to illustrate or elucidate some other relevant fact or evidence, or to corroborate or disprove some other evidence offered or to be offered and their admission is within the sound discretion of the trial judge. Photographs which depict the character and location of external wounds on the body of a deceased are admissible even though they are cumulative and based upon undisputed matters. The fact that a photograph is gruesome and ghastly is no reason to exclude its admission into evidence, if it has some relevancy to the proceedings, even if the photographs may tend to inflame the jury."

Magwood v. State, 494 So.2d 124, 141 (Ala.Cr.App.1985), affirmed, 494 So.2d 154 (Ala.1986) (citations omitted).

In the present case, the photographs corroborated certain State's evidence and illustrated certain witnesses' testimony. Moreover, the photographs served to prove

the victim's identity, show the nature and extent of his wounds, depict the condition of the scene where the body was found, and depicted the condition and existence of certain items of evidence, as well as their location. We find no abuse of discretion by the trial court in the admission of these photographs. *Grice v. State*, 527 So.2d 784 (Ala.Cr.App.1988).

XV

The appellant further argues that the State introduced photographs of the victim, while he was still alive, in order to obtain a verdict and sentence based on passion and prejudice, in violation of her rights to a fair trial and sentencing. She argued that the photographs of the victim while he was alive were irrelevant to any issue before the jury and introduced solely to inflame the jury. The single picture of the victim, prior to his murder, was relevant as it tended to identify the victim, especially in light of the condition of the victim's face after having been shot. As such, the introduction of this photograph during the guilt phase was not an Eighth Amendment violation. See *Willis v. Kemp*, 838 F.2d 1510, 1521 (11th Cir.1988), cert. denied, 489 U.S. 1059, 109 S.Ct. 1328, 103 L.Ed.2d 596 (1989).

Moreover, the introduction of this photograph during the sentencing phase was not error. "It is not necessary that the sentencing decision be made in the context in which the victim is a mere abstraction." *Brooks v. Kemp*, 762 F.2d 1383, 1409 (11th Cir.1985) (en banc), vacated, 478 U.S. 1016, 106 S.Ct. 3325, 92 L.Ed.2d 732 (1986).

XVI

The appellant argues that she was denied a fundamentally fair trial and sentencing, due to several instances of prosecutorial misconduct. Those prosecutorial comments made during the guilt phase will be addressed under subheading "A" and those prosecutorial comments made during the sentencing phase will be addressed under subheading B.

A

The appellant cites a number of comments made by the prosecutor during closing argument which she alleges were so prejudicial as to mandate reversal. Only two of these instances were objected to; the remaining are raised for the first time on appeal, and, therefore, must be analyzed under the "plain error" rule. Rule 45A, A.R.App.P. The objected-to comments concern the prosecutor's reference to "open file discovery," and her comment that the testimony of State's witness Trimble and that of State's witness McCarter matched.

The comment made by the prosecutor concerning the State's open file discovery was as follows:

> "You saw her [the appellant's] testimony, and you saw she had her story down pretty good. She's had what, eighteen months, eighteen months since she started planning this. Fourteen-sixteen months since she's been arrested. She's had nothing to do but get her story straight, with the advantage of having every piece of evidence the State had through its resources, she had. So you see, she had our

> resources, too, didn't she? – and the advantage of being able to concoct her story to fit as best it could. The State has – "[DEFENSE COUNSEL]: Objection, Your Honor. That's not the evidence and – it's not a legitimate inference from the evidence.
>
> "THE COURT: Let's move on. It's argument."

Prior to this comment, during defense counsel's closing argument, the following transpired:

> "And how do you prove your innocence? Now, remember, when you think about that, think of all the resources of the State. You've got Investigators, Sheriff's Department, you've got the Police Department, you've got numerous resources to gather evidence. Think about all those resources being focused on one little Louise Harris. Think about the overwhelming burden that is to one little individual with limited resources. Think about your friend or whoever was charged with that type of offense. Have some compassion for them."

The State's reference to the fact that the appellant had access to all of the State's evidence was a proper reply in kind to the appellant's argument that she had very limited resources, as opposed to those of the State. See *Kuenzel v. State*, 577 So.2d 474, 503 (Ala.Cr.App.1990), affirmed, 577 So.2d 531 (Ala.1991), cert. denied, ___ U.S. ___, 112 S.Ct. 242, 116 L.Ed.2d 197 (1991), citing *Ex parte Rutledge*, 482 So.2d 1262, 1264 (Ala. 1984). See also *Salter v. State*, 578 So.2d 1092 (Ala.Cr.App.1990), cert. denied, 578 So.2d 1097 (Ala.1991); *Smith v. State*, 588 So.2d 561, 572 (Ala.Cr.App.1991).

Moreover, even if this comment could be considered error as a comment on matters not in evidence, the comment would constitute harmless error. See *Kuenzel v. State*, 577 So.2d 474, 493 (Ala.Cr.App.1990). Cf. *Chatom v. State*, 591 So.2d 101 (Ala.Cr.App.1991).

The comment by the prosecutor that the two State's witnesses, Trimble and McCarter, gave testimony that "matched" is a proper inference from the evidence, as these witnesses did not contradict each other, during their testimony, in any significant regard.

> "Although counsel has 'no right to create evidence by his argument.' *Davis v. State*, 49 Ala.App. 587, 590, 274 So.2d 360, 363 (1972), cert. denied, 290 Ala. 364, 274 So.2d 363 (1973), 'counsel may draw any inference which the facts tend to support.' *Brothers v. State*, 236 Ala. 448, 452, 183 So. 433, 436 (1938). 'Counsel for the State and defendant are allowed a rather wide latitude in drawing their deductions from the evidence.' *Arant v. State*, 232 Ala. 275, 279, 167 So. 540, 543 (1936). 'Counsel has a right to argue any reasonable inference from the evidence or lack of evidence . . . and to draw conclusions from the evidence based on their own reasoning.' *Roberts v. State*, 346 So.2d 473, 476 (Ala.Cr.App.), cert. denied, 346 So.2d 478 (Ala.1977). 'Trial judges ordinarily are loath to limit inferential argument which has any connection with the evidence even though farfetched. . . . So long as counsel does not travel out of his case and confines statements to reasonable inferences deducible from the evidence, he should not be controlled.' *Roberts*, 346 So.2d at 477. '[I]t would be dangerous to accord the presiding judge the right and power to intervene and declare authoritatively when an inference of counsel is or is not legitimately drawn. This is for the jury to determine, if there be any testimony on which to base it.' *Cross v. State*, 68 Ala. 476, 483 (1881)."

Kuenzel v. State, supra at 493-94.

The other prosecutorial comments made during the guilt phase that the appellant alleges are error were not objected to and therefore to be considered on appeal must amount to "plain error," or error that has or probably has "adversely affected the substantial right of the appellant." Rule 45A, A.R.App.P. The appellant refers to 10 allegedly improper comments by the prosecutor during his closing argument in the guilt phase.

The prosecutor's comment that State's witness Patterson had no reason to lie and that State's witness Trimble had nothing to gain were proper inferences from the evidence. The evidence showed that Patterson was not an accomplice to the murder and that Trimble was in no way suspected of being involved. Moreover, there is no evidence of any bargains made in exchange for Trimble's testimony. These comments by the prosecutor were also proper as reply in kind to defense counsel's previous argument that both witnesses were biased and had a motive for testifying for the State.

The appellant also argues that the prosecutor's statement that Lorenzo McCarter would "have his day in court" was not a proper inference from the evidence. However, the record indicates that the agreement made by the State, in order to gain McCarter's testimony, was

that the State would not seek the death penalty in McCarter's capital murder trial. There was no evidence that the charges against McCarter would be dropped or that McCarter would plead guilty to the capital offense. Moreover, even if McCarter were to plead guilty, the State would still have to prove his guilt. See § 13A-5-42, *Code of Alabama* 1975.

The prosecutor's reference to the fact that Alex Hood and Michael Sockwell invoked their Fifth Amendment right to remain silent was made pursuant to her explanation of the agreement made by the State to obtain McCarter's testimony. Although the appellant argues that this comment was error under *Ex parte Tomlin*, 540 So.2d 668 (Ala.1988), the present case is readily distinguishable. In *Ex parte Tomlin*, the Alabama Supreme Court held that it was prosecutorial error for the State to repeatedly refer during closing argument to the fact that the defendant's wife could not be called to testify. The Court held that this comment implied that the defendant's wife was not testifying because she knew something that would implicate her husband. In the present case, the two witnesses took the stand and refused to testify in front of the jury. Moreover, no close relationship exists between these witnesses and the appellant, which would lead to the inference that these witnesses knew that the appellant was guilty and were refusing to testify in order to protect her. More reasonably, these witnesses' refusal to testify would have been a matter of self-protection. Because the jury was well aware of the fact that the two witnesses refused to testify, the prosecutor was merely commenting on the evidence.

The comment by the prosecutor that the appellant moved out of her mother-in-law's house so that she could have the privacy in which to carry on an affair was a reasonable inference from the evidence. There was evidence presented that the appellant was very unhappy with the fact that she was living with the victim's mother, and there was also evidence that the appellant had been involved in other extramarital affairs prior to the one with Lorenzo McCarter.

The prosecutor's comment that the appellant had possibly been drinking or was otherwise intoxicated when she was called concerning the victim's whereabouts on the night of his murder was a proper inference from the evidence. There was testimony that the appellant's speech was slurred and sluggish during the telephone call and, when questioned the witness, who had placed the call, stated that he was uncertain whether this could have been the result of a state of intoxication.

The prosecutor's comment that the appellant was "begging . . . to frame Freddie Patterson" was a proper reply in kind to defense counsel's argument that Patterson was, in fact, an accomplice and should have been charged in the present case.

The prosecutor's comment that the appellant wanted the victim killed by Friday because of a car loan was also a proper inference from the evidence. Trimble testified that the appellant had stated she wanted the victim killed by Friday because he was dipping into his insurance policies in order to build an addition onto their house. There was also testimony that the appellant knew that

her husband was in the process of purchasing an automobile for her daughter. The prosecutor further stated that the car loan did not "come through" as a reply in kind to defense counsel's argument during his closing statement, wherein he stated:

> "Look at this loan application that they've made a big to-do over. Take this back and look at it. Sergeant Harris was buying a car for Louise's daughter. Eight hundred and fifty dollars. They have been trying to tell you all this time she had to get him killed before he got the eight hundred and fifty dollars. Now this is real important to them. They struggled to get this in. They – you know, they brought witnesses up here and they got it in and here it is. Take this application back and look at it. If you don't know from your own experience, this application is going to tell you. When you go down to get a loan at the Credit Union you have credit life on it, and it's right there – credit life. Now what does that mean? We all know if Sergeant Harris had gotten the eight hundred and fifty dollars and then been killed, the loan would have been paid for and they would have had another car in the family."

The prosecutor's comments that there was no evidence that McCarter had a criminal conviction and that McCarter had made consistent statements concerning the murder since his arrest were proper inferences from the evidence. The record indicates that there was no evidence before the jury of any convictions, although McCarter had admitted that Harris got him "out" when he had been charged with driving under the influence. Moreover,

McCarter's statements had not significantly changed since he had admitted his guilt.

The prosecutor's statement that Trimble did not change his testimony concerning his voice identification of Harris was a proper argument. Although Trimble initially testified that the appellant was not identified as "the voice" on the telephone subsequently, during a conference outside the presence of the jury, Trimble testified that he had misunderstood the trial court's initial question concerning the identification. Although an inference could be drawn that the witness intentionally changed his testimony, it is also possible that he misunderstood the question.

> " 'Counsel in the trial of any lawsuit has the unbridled right (to be sure, the duty) to argue the reasonable inferences from the evidence most favorable to his client.' *Ex parte Ainsworth*, 501 So.2d 1269, 1270 (Ala.1986) (footnote omitted). '[T]he rule is that counsel are allowed considerable latitude in drawing their deductions from the evidence in argument to the jury.' *Espey v. State*, 270 Ala. 669, 674, 120 So.2d 904, 907 (1960)."

Kuenzel, supra at 492.

Similarly, the prosecutor was merely arguing on behalf of his "client" when he requested that the jurors not consider the lesser-included offense of murder. The prosecutor, as an advocate, has the right to make such arguments to the jury.

B

The appellant cites several allegedly improper comments by the prosecutor during the sentencing hearing before the trial judge, which she argues resulted in a jury verdict override and in imposition of the death sentence, based on improper considerations. The appellant raised no objections to any of the now-cited comments made during the prosecutor's closing argument in this sentencing hearing.

> " 'While this failure to object does not preclude review in a capital case, *it does weigh against any claim of prejudice.' Ex parte Kennedy,* 472 So.2d [1106] at 1111 (emphasis in original). 'This court has concluded that the failure to object to improper prosecutorial arguments . . . should be weighed as part of our evaluation of the claim on the merits because of the suggestion that the defense did not consider the comments in question to be particularly harmful.' *Johnson v. Wainwright,* 778 F.2d 623, 629 n. 6 (11th Cir.1985), cert. denied, 484 U.S. 872, 108 S.Ct. 201, 98 L.Ed.2d 152 (1987). 'Plain error is error which, when examined in the context of the entire case, is so obvious that failure to notice it would seriously affect the fairness, integrity, and public reputation of the judicial proceedings.' *United States v. Butler,* 792 F.2d 1528, 1535 (11th Cir.), cert. denied, 479 U.S. 933, 107 S.Ct. 407, 93 L.Ed.2d 359 (1986)."

Kuenzel v. State, supra at 489.

The prosecutor commented that the aggravating circumstance that the capital offense was committed for pecuniary gain was established by the jury's verdict of

guilt on the capital count. This argument is a correct statement of the law. See *Haney v. State,* 603 So.2d 368 (Ala.Cr.App.1991) ("where a defendant has been convicted of the capital offense of murder for hire, even though that person was the hirer and was convicted of the offense as an accomplice pursuant to the complicity statute, the aggravating circumstance that the capital offense was committed for pecuniary gain is established as a matter of law").

The prosecutor's argument that the trial court should not consider the testimony of the appellant's five character witnesses, because none of them knew of her affair with Lorenzo McCarter was not an improper comment. The evidence indicates that each of the witnesses stated that they were unaware that the appellant was having the extramarital affair with McCarter. "The prosecutor has the right to present his impressions from the evidence. He may argue every matter of legitimate inference and may examine, collate, sift, and treat the evidence in his own way." *Donahoo v. State,* 505 So.2d 1067, 1072 (Ala.Cr.App.1986). Further, the prosecutor's argument to the trial court could be understood as a comment that the witnesses must not have known the appellant very well, if they were unaware of the affair.

Moreover, any inferential argument by the prosecutor that the appellant should be sentenced to death because she was not a good person would be a legitimate argument based on evidence that she hired people to murder her husband for money and to legitimize an extramarital affair.

The next allegation of error by the prosecutor concerned her argument to the trial court that he not consider the credibility of certain State's witnesses, particularly McCarter, in that the jury had already considered that evidence and arrived at a verdict of guilt. Essentially, the prosecutor argued that the trial court not consider the credibility of certain State's witnesses as a nonstatutory mitigating factor. This comment does not violate *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), which held that a trial court must consider such nonstatutory mitigating circumstances as aspects of the defendant's character and background, as well as certain circumstances of the offense. As stated by the United States Supreme Court in *Franklin v. Lynaugh*, 487 U.S. 164, 174, 108 S.Ct. 2320, 2327, 101 L.Ed.2d 155 (1988):

> "Our edict that, in a capital case, ' "the sentencer. . . . [may] not be precluded from considering, as a *mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense," ' *Eddings v. Oklahoma*, 455 U.S. 104, 110, 102 S.Ct. 869, 874, 71 L.Ed.2d 1 (1982) (quoting *Lockett*, 438 U.S., at 604, 98 S.Ct. at 2964), in no way mandates reconsideration by juries, in this sentencing phase, of their 'residual doubts' over a defendant's guilt. Such lingering doubts are not over any aspect of petitioner's 'character,' 'record,' or a 'circumstance of the offense.' This Court's prior decisions, as we understand them, fail to recognize a constitutional right to have such doubts considered as a mitigating factor."
>
> "Our cases do not support the proposition that a defendant who has been found to be guilty of a capital crime beyond a reasonable doubt has a constitutional right to reconsideration by the sentencing body of lingering doubts about his guilt. We have recognized that some states have adopted capital sentencing procedures that permit defendants in some cases to enjoy the benefit of doubts that linger from the guilt phase of the trial, see *Lockhart v. McCree*, 476 U.S. 162, 181, 106 S.Ct. 1758, 1768, 90 L.Ed.2d 137 (1986), but we have never indicated that the Eighth Amendment requires states to adopt such procedures. To the contrary, as the plurality points out, we have approved capital sentencing procedures that preclude consideration by the sentencing body of 'residual doubts' about guilt. See *Ante*, [487 U.S. at 173 n. 6, 108 S.Ct.], at 2327, n. 6."
>
> "Our decisions mandating jury consideration of mitigating circumstances provide no support for petitioner's claim because 'residual doubt' about guilt is not a mitigating circumstance. We have defined mitigating circumstances as facts about the defendant's character or background, or the circumstances of the particular offense, that may call for a penalty less than death. [citations omitted]. 'Residual doubt' is not a factor about the defendant or the circumstances of the crime. It is instead a lingering uncertainty about facts, a state of mind that exists somewhere between 'beyond a reasonable doubt' and 'absolute certainty.' "

Id., at 187-88, 108 S.Ct. at 2334-35.[4]

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[4] This latter quote is taken from Justice O'Conner's concurring opinion, which was joined in by Justice Blackmun.

The appellant argues that the prosecutor improperly urged the trial court to disregard the jury's verdict. However, the record indicates that the prosecutor stated, "[T]he Court should consider the jury's verdict"; however, she urged the trial court to override the jury's recommended sentence because, she argued, it was based on emotion rather than on evidence. The prosecutor may formulate reasonable arguments from the evidence. Emotion, sympathy, and passion are not proper sentencing considerations. See *Beck v. State*, 396 So.2d 645, 663 (Ala.1980). Moreover, a jury verdict override is permitted in Alabama by § 13A-5-47(e), *Code of Alabama* 1975, and such a statute has been held constitutional. See *Proffitt v. Florida*, 428 U.S. 242, 252, 96 S.Ct. 2960, 2966, 49 L.Ed.2d 913 (1976).

The appellant argues that the prosecutor improperly argued that the appellant should be sentenced to death because she had not been "battered" by the victim and therefore the fact that she had been abused could not be considered as a nonstatutory mitigating circumstance. However, the prosecutor's comment referred to the fact that the appellant's motive was strictly money or legitimization of an extramarital affair, rather than because she had been abused by the victim. The record indicates that evidence had been introduced during the guilt phase of the trial that the appellant was battered and abused by the victim. The prosecutor's comment was proper argument against a nonstatutory mitigating circumstance that could have been considered by the trial court; i.e., because the appellant's background is a proper consideration under *Lockett v. Ohio*, supra, the fact that she had or

had not been battered by her husband could have been considered by the trial court in sentencing.

The appellant also argues that the prosecutor improperly commented on the appellant's lack of remorse. However, this comment was a proper inference from the evidence, because testimony had been introduced at trial that the appellant's reaction to being informed of her husband's death was so unemotional that she was questioned concerning her reaction. Her response was that she and the victim had suffered marital problems.

The appellant argues that the prosecutor improperly referred to her father's death, which was irrelevant to the instant case, and inferred that he was killed in the same manner as the victim in the present case. The following occurred during the closing arguments by the prosecutor:

> "[PROSECUTOR]: The Court had asked earlier about the testimony about her father dying and the circumstances surrounding that. We would refer the Court to the notes and, of course, the transcript is not ready, but the Court might could take its mind back to the testimony of Dorinda Hinton, the Sheriffs Investigator. Just before cross-examination, Investigator Hinton told the jury and the Court about her conversations with the defendant, and in addition to the comments about McCarter was a wonderful lover, she was asked and talked about what she said about her father. And Hinton testified before this Court, that this defendant, the night he was killed and she was informed of it, said my father was killed just like that. And, of course, our facts are the Deputy Sheriff is killed in an ambush by a shotgun. Not only that, but I

> believe the testimony will show that when this defendant testified she was asked on cross-examination if she said that and if it were true and I believe the record would show that she did say that. So that's the basis, from our perspective, of where that evidence came from. Certainly we are not asking this Court to find her guilty of her father's death, that's not why it was brought out, but to show her mental state, her emotional state at the time she was informed of his death."

The record indicates that during the course of the trial, State's witness Dorinda Hinton testified that, after being told of her husband's death, the appellant stated to Hinton that her father had been killed like the victim. Subsequently, during defense counsel's direct examination, the appellant testified that she was in her "20's" when her father died by gunshot. Thus, the prosecutor's argument was a correct comment on the evidence. Moreover, although the reference to this evidence may have unduly prejudiced the appellant, any error did not rise to the level of "plain error." " 'Plain error is error which, when examined in the context of the entire case, is so obvious that failure to notice it would seriously affect the fairness, integrity, and public reputation of the judicial proceedings.' " *Kuenzel v. State*, supra, at 489, quoting *United States v. Butler*, 792 F.2d 1528, 1535 (11th Cir.), cert. denied, 479 U.S. 933, 107 S.Ct. 407, 93 L.Ed.2d 359 (1986).

XVII

The appellant argues that the State failed to establish sufficient evidence to sustain her conviction of capital

murder and her sentence of death. Specifically, the appellant argues that the State failed to satisfy its burdens in two respects: the State, she argues, failed to provide sufficient corroboration of accomplice testimony, and failed to prove that the murder was committed for pecuniary gain.

The record indicates that neither Patterson nor Trimble were accomplices. In the present case the question of complicity constituted a question of fact for the jury to decide and, by its verdict, it is clear that it found sufficient corroboration of accomplice testimony. Patterson was present with the majority of the coconspirators during the commission of the offense. He testified to a female voice broadcasting over McCarter's beeper the message "He is leaving." Trimble testified that he was solicited by the appellant to commit the offense. Moreover, she was implicated by her conduct upon learning of her husband's death and by her statement that, if McCarter committed the offense, she did not tell him to do so. Moreover, she admitted to her affair with McCarter and to having had marital problems with the victim.

> "A conviction of felony cannot be had on the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with such commission of the offense, and such corroborative evidence, if it merely shows the commission of the offense or the circumstances thereof, is not sufficient."

§ 12-21-222, *Code of Alabama* 1975. The State presented corroborative evidence to connect the appellant with the commission of the offense.

Furthermore, the State presented sufficient evidence to support the pecuniary gain element of the capital charge. Trimble testified that the appellant told him on the telephone that the murder should be committed by Friday to prevent that victim from spending the insurance money. McCarter testified that the appellant provided $100 initially to pay Sockwell and Hood to commit the murder, with the promise of more when the appellant collected the insurance money.

Moreover, the State also provided sufficient evidence that the appellant hired Sockwell and Hood to murder her husband. Thus, under both theories, the State presented sufficient evidence to support the conviction and the aggravating circumstance of murder for pecuniary gain.

XVIII

The appellant argues that the trial court's instructions during the guilt phase of her trial, violated the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 1, 6, and 15 of the Constitution of Alabama. The record indicates that the appellant failed to object to any of these allegations of error and, therefore, these instances must be analyzed pursuant to the "plain error" doctrine.

The appellant argues that the trial court failed to instruct the jury that the State was required to prove that she knew about her husband's insurance and retirement benefits before she could be found guilt of committing murder for pecuniary gain. The record indicates that the trial court charged the jury that it must be convinced that

the appellant committed the intentional murder and that the murder was committed for a pecuniary gain or pursuant to a contract for hire. This language substantially tracks the language of § 13A-5-40(a)(7), *Code of Alabama* 1975. "A charge which tracks the identical language of the statute is proper. *Jordan v. State*, 17 Ala.App. 575, 87 So. 433, cert. denied, 205 Ala. 114, 87 So. 434 (1920)." *King v. State*, 595 So.2d 539 (Ala.Cr.App.1991). Moreover, charges which track the language of a Code section are sufficient. See generally *Salter v. State*, 578 So.2d 1092, 1096 (Ala.Cr.App.1990), writ denied, 578 So.2d 1097 (Ala.1991).

Although the appellant argues that the trial court did not adequately instruct the jury on the lesser-included offense of murder, a review of the trial court's entire charge reveals that the appellant's argument is without merit. The trial court instructed the jury on intentional murder, as a separate offense, and emphasized the distinction between the two offenses. *Ex parte Kennedy*, 472 So.2d 1106 (Ala.1985), cert. denied, 474 U.S. 975, 106 S.Ct. 340, 88 L.Ed.2d 325 (1985).

Although the appellant argues that the trial court erred in failing to charge the jury on the lesser-included offense of reckless murder, clearly the evidence would not have supported such a charge. Reckless murder requires conduct that creates a great risk of death to human life in general. *Fisher v. State*, 587 So.2d 1027 (Ala.Cr.App.1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1486, 117 L.Ed.2d 628 (1992). The evidence presented in the present case shows that the murder was committed after laying in wait for and ambushing Isaiah Harris.

Therefore, a charge on universal malice or reckless murder would have been improper.

The appellant claims that the trial court failed to instruct the jury that a particularized intent to kill must be proved beyond a reasonable doubt. However, a review of the trial court's entire charge reveals that the jury was charged as to the requisite particularized intent to kill. Similarly, although the appellant argues that the trial court's instruction on corroboration of accomplice testimony was insufficient, a review of the charge establishes that the appellant's claim is without merit.

The other claimed errors by the appellant in the trial court's oral charge to the jury, are either legally incorrect[5] or do not constitute plain error.[6]

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[5] For example, the appellant argues that the trial court's instruction about promises received by McCarter was misleading, because it suggested that the promise that the State would not seek the death penalty was not binding because the court was not a party.

[6] The appellant cites as error the trial court's failure to define the term "a crime of moral turpitude." Moreover, the appellant cites as error the trial court's reference during his oral charge to the "State of Alabama, figuratively, the people of this community [who] come into this courtroom by and through their representatives from the District Attorney's Office." However, a review of the context of this language clearly demonstrates that the trial court was instructing the jury on the importance of its role in the judicial system.

XIX

The appellant contends that the trial court's imposition of the death sentence, after the jury returned a verdict of life imprisonment without parole, violated her constitutional rights. Generally, the appellant argues that the trial court's override of the jury's recommended verdict was standardless and arbitrary. However, the constitutionality of A..bama's statutory sentencing scheme was approved by the United States Supreme Court in *Proffitt v. Florida*, 428 U.S. 242, 252, 96 S.Ct. 2960, 2966, 49 L.Ed.2d 913 (1976), and the jury verdict override provisions were specifically found constitutional in *Spaziano v. Florida*, 468 U.S. 447, 457-67, 104 S.Ct. 3154, 3160-66, 82 L.Ed.2d 340 (1984). Pursuant to § 13A-5-47(e), *Code of Alabama* 1975, "[t]he trial court and not the jury is the sentencing authority". *Freeman v. State*, 555 So.2d 196, 213 (Ala.Cr.App.1988), affirmed, 555 So.2d 215 (Ala.1989), cert. denied, 496 U.S. 912, 110 S.Ct. 2604, 110 L.Ed.2d 284 (1990). "The trial court is authorized to reject the jury's recommendation of life without parole when imposing sentence and to impose a death sentence." *Id.* See also *Tarver v. State*, 500 So.2d 1232, 1251 (Ala.Cr.App.), affirmed, 500 So.2d 1256 (Ala. 1986), cert. denied, 482 U.S. 920, 107 S.Ct. 3197, 96 L.Ed.2d 685 (1987); *Thompson v. State*, 542 So.2d 1286, 1300 (Ala.Cr.App.1988), affirmed 542 So.2d 1300 (Ala.1989), cert. denied, 493 U.S. 874, 110 S.Ct. 208, 107 L.Ed.2d 161 (1989).

Although the appellant argues that the jury verdict override standards adopted by Florida in *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975) are constitutionally required, this court has previously rejected that argument. See *White v. State*, 587 So.2d 1218 (Ala.Cr.App.1990), affirmed,

587 So.2d 1236 (Ala.1991), cert. denied, ___ U.S. ___, 112 S.Ct. 979, 117 L.Ed.2d 142 (1992), citing *Ex parte Jones*, 456 So.2d 380, 381-82 (Ala.1984), cert. denied, 470 U.S. 1062, 105 S.Ct. 1779, 84 L.Ed.2d 838 (1985). See also *Hadley v. State*, 575 So.2d 145 (Ala.Cr.App.1990).

Moreover, the appellant claims that the trial court's override of the jury's recommendation of a sentence of life without parole was fundamentally unfair in the present case for a number of reasons: because it considered allegedly inadmissible evidence, specifically a presentence report and statements of the appellant's codefendants; because the prosecutor's argument at the sentence hearing was allegedly improper; because the trial court based its death sentence on the aggravating circumstance of pecuniary gain for which there was insufficient evidence; because the trial court failed to weigh the mitigating circumstance that the appellant had no significant history of prior criminal activity; and because the trial court allegedly failed to consider the jury's recommended verdict of life without parole. Because this court has previously held in this opinion that there was sufficient evidence presented by the State to support the aggravating circumstance of pecuniary gain and that the prosecutor's argument during the sentencing hearing was proper, these claims will not be discussed.

Moreover, this court has previously held that presentence reports are admissible evidence, which may be considered by a trial court in sentencing a defendant to death, provided the information contained therein is relevant to sentencing and the defendant has an opportunity to rebut this evidence. See *Thompson v. State*, 503 So.2d 871, 880-881 (Ala.Cr.App.1986), affirmed, 503 So.2d 887

(Ala.), cert. denied, 484 U.S. 872, 108 S.Ct. 204, 98 L.Ed.2d 155 (1987).

> "It is clear to this Court that the use of the presentencing report is consistent with Ala. Code 1975, § 13A-5-45(d), Alabama's capital murder statute which states:
>
> > " 'Any evidence which has probative value and is relevant to sentence shall be received at the sentence hearing regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of Alabama.'
>
> "The entire report itself is an out-of-court statement and is entirely hearsay; however, it is admissible under the Ala. Code 1975, § 13A-5-47. *Thompson v. State*, supra. The trial court is not obligated to do more than provide a fair opportunity for rebuttal; where the record indicates that the defendant was given sufficient opportunity to rebut any hearsay statements made at the sentencing hearing, there is no error. *Johnson v. State*, 399 So.2d 859 (Ala.Crim.App.1979), *aff'd in part and rev'd on other grounds*, 399 So.2d 873 (Ala.1979)."

Ex parte Davis, 569 So.2d 738, 741 (Ala.1990), cert. denied, 498 U.S. 1127, 111 S.Ct. 1091, 112 L.Ed.2d 1196 (1991). In the present case, the appellant was provided a copy of the presentence report and was provided the opportunity [sic] rebut the statements in the report, and in fact did so.

Furthermore, the statements by the codefendants were admissible, because they were relevant to sentencing and had probative value. Additionally, the record indicates that the appellant requested the trial court to consider one of her codefendant's statements; therefore, any alleged error would have been invited. *Gibson v. State*, 555 So.2d 784, 797 (Ala.Cr.App.1989). For a full discussion of this issue see Part XX, infra.

The record indicates in the trial court's written sentencing order that the trial judge in fact found the existence of the mitigating circumstance that the appellant had no prior criminal history. In the sentencing order the trial court stated:

> "In weighing the aggravating and mitigating circumstances, the Court is aware of the nature of the process as defined in Section 13A-5-48. It is not a matter the Court takes lightly. After carefully considering the matter, the Court is convinced that the one statutory aggravating circumstance found and considered far outweighs all of the non-statutory mitigating circumstances, and that the sentence ought to be death."

It is this statement by the trial court that it weighed all of the nonstatutory mitigating circumstances without referring any statutory mitigating circumstances on which the appellant bases her claim. However, in its sentencing order the trial court also stated that: "Section 13A-5-51(1) mitigating circumstance is present. The defendant has no criminal history." Moreover, following this hearing, a hearing was held on the State's motion, filed pursuant to

Rule 10(f), A.R.App.P., during which the trial court indicated that it had considered this statutory mitigating circumstance. Because the sentencing order clearly states that the trial court found the existence of this mitigating circumstance and that it weighed the aggravating circumstance against the statutory and nonstatutory mitigating circumstances, as required by § 13A-5-48, *Code of Alabama* 1975, we find no error in the instant case.

Finally, the sentencing order clearly indicates that the trial court also considered the jury's advisory verdict. The jury recommended a sentence of life without parole by a vote of seven to five. There is no indication in the record that the trial court failed to consider this advisory sentence.

XX

The appellant argues that the trial court erroneously considered statements made by codefendants Sockwell and Hood during the sentencing hearing at which the jury's advisory verdict was overridden. The appellant bases this claim on the grounds that she was not given an opportunity to cross-examine these codefendants or to challenge the reliability of their confessions. No objections were raised by the appellant on these grounds during the sentencing hearing, thus any claim error must rise to the level of plain error. Rule 45A, A.R.App.P. This failure to object weighs against any claim of prejudice. *Ex parte Womack*, 435 So.2d 766, 769 (Ala.), cert. denied, 464 U.S. 986, 104 S.Ct. 436, 78 L.Ed.2d 367 (1983). Moreover, the record indicates that it was the appellant who

requested that one of the codefendant's statements be considered.

During the sentencing hearing, defense counsel stated as follows:

> "Your Honor, we have reviewed the report of the sentencing department that you've ordered and we have some objections to the report. I guess we should address those right now. In regard – we do not have an objection to the conclusion reached in the recommendation of life without parole but in case the Court is to rely on the report, we object to that part of the report, whereby the presentencing department has stated that Louise Harris was identified by all of the co-defendants as having planned the murder. We would submit the statement or request that the statement of Alex Hood be entered and we say that that does not support it by the evidence."

Thereafter, in examining the parole officer who prepared the presentence report, defense counsel elicited testimony that the officer had not considered the entire statements of the co-defendants, concluding that the evidence the officer had reviewed was an investigative report prepared by the police department. Thereafter, during the prosecutor's examination of this witness, he was asked if he had read the statements of McCarter, Hood, and Sockwell. He responded that he had not read their specific statements. The trial court then stated as follows:

> "THE COURT: Let me interrupt for a minute. Did I not request this morning that you go get those statements? I want everybody to know this.

> "THE WITNESS: Yes, sir.
>
> "THE COURT: And I now have 'em, but I have not had an opportunity to read 'em since they weren't attached to the report. But for the record's sake and for this, I have requested those question and answer statements to be made a part of this report.
>
> "[PROSECUTOR]: State has no objection and would join in the motion of the defense as to Mr. Hood's, and we would also request the Court to consider the other two.
>
> "THE COURT: Well, I've requested all three."

"An accused cannot by his own voluntary conduct invite error and then seek to profit thereby." *Spears v. State*, 428 So.2d 174, 179 (Ala.Cr.App.1982). "The invited error rule has been applied equally in both capital cases and noncapital cases." *Rogers v. State*, 630 So.2d 78 (Ala.Cr.App.1991), reversed on other grounds, 630 So.2d 88 (Ala.1992).

The appellant sought to introduce these statements by the codefendants in order to rebut the claim in the presentence investigation report that the accomplices identified her as having participated in the murder. Therefore, the codefendants' statements were relevant. Moreover, hearsay evidence, such as these statements, may be introduced and considered during the sentencing stage of the capital murder trial. See *Henderson v. State*, 583 So.2d 276 (Ala.Cr.App.1990), affirmed, 583 So.2d 305 (Ala.1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1268, 117 L.Ed.2d 496 (1992). See also § 13A-5-45(d) and (e), *Code of Alabama* 1975. Thus, because this evidence was relevant

and because its introduction was requested by the appellant, admitting these statements did not constitute plain error.

XXI

The appellant argues that her sentence of death cannot stand because it was based on one aggravating circumstance, which she claims was inapplicable in her case. The appellant argues that the State failed to prove either that Sockwell and Hood were paid for the killing, or that the appellant would gain the insurance money and other benefits paid upon her husband's death. However, the record indicates that the State clearly proved the aggravating circumstance pursuant to both of these theories. The evidence established the pecuniary gain aggravating circumstance by showing that the appellant paid Hood and Sockwell each $50 for committing the offense. The pecuniary gain "aggravating circumstance should be considered as established where the defendant is convicted of the capital offense as an accomplice-hirer." *Haney v. State*, 603 So.2d 368 (Ala.Cr.App.1991).

Furthermore, the State presented sufficient evidence to support the theory that the appellant had had her husband murdered in order to secure his insurance proceeds as well as other benefits. As previously discussed, McCarter testified that the appellant was aware of these benefits and that she wanted her husband killed in order to obtain them; McCarter further testified that Sockwell and Hood were paid $50 each and were promised more when the appellant secured these monies; Trimble testified that the appellant wanted her husband murdered

before he borrowed against too much of his insurance money; and the appellant admitted that she was familiar with her husband's paycheck and the fact that certain monies were withheld from it to provide for certain benefits. Thus, the State provided sufficient evidence of this aggravating circumstance.

XXII

The appellant argues that her sentence of death is disproportionate to sentences imposed on similar defendants under similar circumstances. Specifically, she refers to the fact that Lorenzo McCarter did not receive the death sentence and that other cases exist, involving similar crimes, in which defendants did not receive a sentence of death.

It is clear that, upon her conviction for murder for pecuniary gain, the appellant was eligible for sentence of death. § 13A-5-51(7), *Code of Alabama* 1975. Moreover, similar penalties have been imposed in similar cases. See *Williams v. State*, 461 So.2d 834 (Ala.Cr.App.1983), reversed on other grounds, 461 So.2d 852 (Ala.1984); *Haney v. State*, supra; *Heath v. State*, 455 So.2d 898 (Ala.Cr.App.1983), affirmed, 455 So.2d 905 (Ala.1984), affirmed, 474 U.S. 82, 106 S.Ct. 433, 88 L.Ed.2d 387 (1985). Under the facts of this case, the appellant's sentence is proportionate to her crime and to sentences imposed in similar cases.

Lorenzo McCarter received a sentence of life without parole, after the State agreed to pursue only a sentence of life without parole, provided that he testify at the appellant's trial. As to the other appellants, Hood, the driver of

the automobile, was convicted of the capital offense and was sentenced to life imprisonment without parole. *Hood v. State*, 598 So.2d 1022 (Ala.Cr.App.1991). Sockwell, the triggerman, was convicted of the capital offense and was sentenced to death. His appeal is now pending before this court. Thus, in the present case, the originator of the offense, who persisted and urged its undertaking and who provided the incentives for its completion, received the death sentence. Moreover, she was the victim's wife and, thus, his closest and most trusted relative. The triggerman also received the death sentence. The middleman, who was having an affair with the appellant and who arranged the liaison between the appellant and the actual murderers, received a sentence of life imprisonment, pursuant to his aid to the State in the case against the appellant. The driver of the automobile also received a sentence of life imprisonment. According to these individual roles in the present offense, we consider the appellant's sentence of death in this case to be proportionate to her accomplices.

XXIII

In accordance with § 13A-5-53, *Code of Alabama* 1975, we have reviewed the record, including the guilt and sentencing proceedings, for any error that adversely affected the rights of the appellant, and we have found none. Nor do we find any evidence that the sentence was imposed under influence of passion, prejudice, or any other arbitrary factor.

The trial court properly found the existence of one aggravating circumstance: that the murder was committed for pecuniary gain. § 13A-5-49(6), *Code of Alabama* 1975. The trial court found the existence of one statutory mitigating circumstance, that the appellant has no criminal history. § 13A-5-51(1), *Code of Alabama* 1975. In his sentencing order, the trial court addressed the statutory mitigating circumstances defined by § 13A-5-51(4), stating that "[w]hile there were others involved and this defendant did not pull the trigger, her participation was such that, but for her, there probably would never have been a killing. She planned it, provided the financing and stood to benefit the most." We find no error in the trial court's holding that this statutory mitigating circumstance was not present in this case. As to the nonstatutory mitigating circumstances, the trial court wrote as follows:

> "Defendant's attorneys did a thorough job of presenting non-statutory mitigating circumstance evidence, and this Court has considered all of it.
>
> "The defendant had family and friends who cared about her and had relationships with her which were beneficial to them and her. She was a hard working and respected member of the community. She was a steady worker in her church and community. She was held in high regard by her employers and friends.
>
> "Some of the evidence was circumstantial and included the testimony of individuals with criminal histories and/or a pending charge. Counsel for the defendant did a thorough job in exploring all weaknesses of the State's case, including the credibility of witnesses. This Court has no reason to go behind the guilty

verdict of the jury and will not do so. This Court finds the defendant guilty beyond a reasonable doubt. This Court has carefully considered all of the non-statutory mitigating circumstance evidence proffered by the defendant. The Court has also given careful consideration to all of the defendant's contentions concerning non-statutory mitigating circumstances including all of the arguments of her attorneys and the contentions reflected in her proffered jury instruction listing mitigating circumstances. All of the defense's non-statutory mitigating circumstance evidence has been carefully considered. In entering the non-statutory mitigating circumstance findings, and the findings concerning statutory mitigating circumstances, the Court applied the burden of proof set out in Section 13A-5-45(g) and has gone further and resolved every legitimate doubt in the defendant's favor."

The trial court properly considered the nonstatutory mitigating circumstance provided by the appellant.

As to the weighing of these aggravating and mitigating circumstances, the trial court wrote:

> "In weighing the aggravating and mitigating circumstances, the Court is aware of the nature of the process as defined in Section 13A-5-48. It is not a matter the Court takes lightly. After carefully considering the matter, the Court is convinced that the one statutory aggravating circumstance found and considered far outweighs all of the non-statutory mitigating circumstances, and that the sentence ought to be death."

After an independent weighing of the aggravating and mitigating circumstances in this case, we find that the evidence supports the trial court's conclusion and indicates that death was the proper sentence. The appellant's statements, actions, role in the offense, and the evidence supporting her guilt, lead us to this conclusion.

The sentence of death in this case is neither excessive nor disproportionate to the penalties imposed in similar cases, considering both the crime and the defendant. See discussion at Issue XXII. Therefore, the appellant's conviction and sentence of death are proper, and the judgment of the circuit court is affirmed.

AFFIRMED.

All the Judges concur, except MONTIEL, J., who dissents with an opinion.

MONTIEL, Judge, dissenting.

Does a defendant in a capital murder case, who is sentenced to death by electrocution, have an absolute right to be present during all pretrial proceedings relating to the case? I believe the answer is yes, because of the guarantees provided by the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fifth Amendment of the United States Constitution.

The majority opinion correctly concludes that the presence of a capital defendant at trial may not be waived by counsel. *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir.1982). The right to participate in the preparation of a defense is a fundamental right afforded to all criminal defendants, especially in those cases in which the charge is punishable by death. The majority, however, ignores

this basic right by concluding that "the appellant's presence [at a pretrial hearing] would have been useless to her defense" or that "she was not prejudiced by her absence". I cannot agree that the appellant was not prejudiced by her absence from numerous hearings.

The majority opinion further concludes that the appellant's right to a fair trial was not violated by the appellant's absence from certain pretrial proceedings; however, the record is silent as to which hearings the appellant did not attend. Should a capital defendant's conviction be upheld where the record concerning the basic constitutional issue presented in this case is incomplete? I believe that we must answer this question in the negative. This case should be remanded to the trial court for that court to supplement the record or to conduct a hearing to determine which pretrial hearings the appellant did not attend. Only with a complete record can this court determine with certainty whether the appellant's constitutional rights were violated.

Justice Harlan F. Stone once stated, "[T]he law itself is on trial in every case as well as the cause before it." This case is a trial on a capital defendant's right to be present at pretrial hearings. This court cannot ignore this right because of the difficult cause in which it is presented.

For the foregoing reasons, I respectfully dissent and I would remand this case to the trial court to supplement the record to reflect the appellant's presence at or absence from all pretrial hearings.

Supreme Court of Alabama.

Ex parte Louise HARRIS.

(In re Louise Harris

v.

State of Alabama).

1920374.

June 25, 1993.

On Application for Rehearing
Oct. 29, 1993.

HOUSTON, Justice.

This is a capital murder case. A detailed statement of the facts appears in the opinion of the Court of Criminal Appeals, *Harris v. State*, 632 So.2d 503 (Ala.Cr.App.1992).

Louise Harris was convicted of capital murder; the jury recommended a sentence of life imprisonment without parole. The trial court overrode the jury's recommendation and sentenced Harris to death by electrocution. Judge McMillan, writing for the Court of Criminal Appeals, affirmed Harris's conviction with a lengthy opinion, from which Judge Montiel dissented. The Court of Criminal Appeals overruled Harris's application for rehearing and denied her Rule 39(k), Ala.R.App.P., motion, without opinion. We then granted certiorari review pursuant to Rule 39(c), Ala.R.App.P.

Having carefully read and considered the record, together with Harris's 141-page brief, the state's 237-page brief, and Harris's 18-page reply brief, we conclude that the Court of Criminal Appeals correctly resolved the issues discussed in its opinion. We do note, however, the

issue on which Judge Montiel dissents – whether Harris had an absolute right to be present at "all pretrial proceedings relating to [her] case" (i.e., proceedings involving questions of law, questions of procedure, or questions regarding the removal of Harris's counsel), pursuant to the guarantees of the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fifth Amendment of the United States Constitution and because every criminal defendant, particularly a defendant in a capital murder case, has the fundamental right to participate in the preparation of her defense. Suffice it to say, without further discussion, that after thoroughly reviewing the record and the applicable law, we are satisfied that the Court of Criminal Appeals adequately addressed and correctly resolved this issue.

We note also that Harris has raised in this Court several issues that were either not presented to or not addressed by the Court of Criminal Appeals. Because this Court may consider any issue in a capital case concerning the propriety of the conviction and the death sentence, and, more importantly, because a person's life hangs in the balance, we have fully considered each of the additional issues Harris has raised. Furthermore, we have independently searched the record for error, as did the Court of Criminal Appeals. However, after carefully researching the applicable law and after exhaustively scouring the record for error, we find no reversible error in the proceedings below.

We do feel, however, that the following issue, raised by Harris in this Court, warrants further discussion: Whether the absence of a full transcript of the voir dire examination of the jury and all bench conferences denied

Harris a fundamentally fair trial in violation of state law and in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and thus constituted reversible error.

Harris bases her argument on Rule 19.4(a), Ala.R.Crim.P., which requires:

> "*In all capital cases* (criminal trials in which the defendant is charged with a death penalty offense), *the court reporter shall take full stenographic notes of voir dire of the jury and of the arguments of counsel,* whether or not such is ordered by the judge or requested by the prosecution or defense. This duty may not be abrogated by the judge or waived by the defendant."

(Emphasis added.) This case was commenced before the adoption of Rule 19.4; therefore, Rule 19.4 is not applicable in this case. Rather, Temporary Rule 21, Ala. Temp.R.Crim.P., governs this case; it read, in part, as follows:

> "(a) *In all capital cases* (criminal cases in which the defendant is charged with a death penalty offense), *the court reporter shall take full stenographic notes of the arguments of counsel* whether or not such is ordered by the judge or requested by the prosecution or defense. This duty may not be abrogated by the judge or waived by the defendant."

(Emphasis added.)

Under Temporary Rule 21(a), there was no requirement that the voir dire examination of the jury be stenographically recorded; and the requirement that the court reporter take "full stenographic notes" of "the arguments

of counsel" – which appeared in Temporary Rule 21(a) and also appears in the current Rule 19.4(a) – does not require the court reporter to transcribe every incidental discussion between counsel and the trial judge that occurs at the bench unless counsel so requests or the court so directs. Instead, the phrase "arguments of counsel" refers to opening and closing arguments of counsel. See, *e.g., Ex parte Godbolt*, 546 So.2d 991 (Ala.1987); *Webb v. State*, 539 So.2d 343 (Ala.Crim.App.1987); *Reeves v. State*, 518 So.2d 168 (Ala.Crim.App.1987); see Ala. Code 1975, § 12-17-275.

In this case, the items or statements omitted from the record were not transcribed because they occurred out of the hearing of the court reporter. However, Harris's trial counsel had moved the trial court to "order the official court reporter to record and transcribe all proceedings in all phases [of the case], including pretrial hearings, legal arguments, voir dire and selection of the jury, in chambers conferences, any discussions regarding jury instructions, and all matters during the trial and in support thereof . . . "; and the court had granted the motion. After granting the motion, the court had the duty to see that the *entire* proceedings were transcribed; we must conclude that the failure to record and transcribe a portion of the voir dire examination of the jury and certain portions of the bench conferences, in light of the fact that Harris was represented on appeal by counsel other than the attorney at trial, constituted error. *See Ex parte Godbolt*,

546 So.2d 991 (Ala.1987).[1] Thus, the question becomes whether that error constituted reversible error.

> " '*When, [as in this case], a criminal defendant is represented on appeal by counsel other than the attorney at trial, the absence of a substantial and significant portion of the record, even absent any showing of specific prejudice or error, is sufficient to mandate reversal.* The wisdom of this rule is apparent. When a defendants is represented on appeal by the same attorney who defended him at trial, the court may properly require counsel to articulate the prejudice that may have resulted from the failure to record a portion of the proceedings. Indeed, counsel's obligation to the court alone would seem to compel him to initiate such disclosure. The attorney, having been present at trial, should be expected to be aware of any errors or improprieties which may have occurred during the portion of the proceedings not recorded. But *when a defendant is represented on appeal by counsel not involved at trial [as in this case], counsel cannot reasonably be expected to show specific prejudice. To be sure, there may be some instances where it can readily be determined from the balance of the record whether an error has been made during the untranscribed portion of the proceedings. Often, however, even the most careful consideration of the available transcript will not permit us to discern whether reversible error occurred while the proceedings were not being recorded. In such a case, to require new counsel to*

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[1] Neither Temporary Rule 21, Ala.Temp.R.Crim.P., nor rule 19.4, Ala.R.Crim.P., was in effect when this Court decided *Ex parte Godbolt*, Nonetheless, the rationale of *Ex parte Godbolt* is applicable to the facts of this case.

establish the irregularities that may have taken place would render illusory an appellant's right to [have the reviewing court] notice plain errors or defects. . . .

" 'We do not advocate a mechanistic approach to situations involving the absence of a complete transcript of the trial proceedings. We must, however, be able to conclude affirmatively that no substantial rights of the appellant have been adversely affected by the omissions from the transcript. When . . . a substantial and significant portion of the record is missing, and the appellant is represented on appeal by counsel not involved at trial, such a conclusion is foreclosed. . . . ' "

Ex parte Godbolt, 546 So.2d at 997. (Citations omitted; emphasis added.) (Quoting with approval *United States v. Selva*, 559 F.2d 1303, 1305-06 (5th Cir.1977)).

We have carefully reread those portions of the record where each omission occurred and have reread the several pages before and the several pages after those omitted portions, to ascertain, if possible, the content and substance of the discussions not transcribed, so as to determine whether "a substantial and significant portion of the record" is missing and to determine whether we could "conclude affirmatively that no substantial rights of [Harris] have been adversely affected by the omissions from the transcript." *Id.*

From this extensive review, and given the particular facts of this case, we have concluded that the untranscribed portions of the proceedings did not constitute "a substantial and significant portion of the record" and we have "conclud[ed] affirmatively that no substantial rights of [Harris] have been adversely affected by the

omissions from the transcript." Rather, we have concluded that the trial court's rulings related to certain omitted portions of the proceedings were adverse to the state and that the content or substance of the other discussions that occurred out of the hearing of the court reporter was general in nature and had no effect on the outcome of the case. We conclude, under the facts of this case, that the error in failing to ensure that the entire proceedings were transcribed was harmless. Therefore, Harris's conviction was properly affirmed.

We note for the Bench and Bar that our holding that the failure to ensure a complete transcript of the proceedings was harmless error is strictly limited to the facts of this case and to the record before us; we are not to be understood as holding that in all cases such an error will be considered harmless. Rather, each case will be limited to and determined on its own facts.

AFFIRMED.

HORNSBY, C.J., and MADDOX and SHORES, JJ., concur.

ALMON, J., concurs in the result.

ADAMS, J., dissents.

ADAMS, Justice (dissenting).

I must respectfully dissent from the majority opinion. In my view, the defendant, under Alabama law as it has developed since *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), was entitled to require the prosecutor to explain the reasons for her peremptory challenges of black veniremembers. The venire consisted of 17 black members and 33 white members. During the

selection process, the prosecutor challenged 12 of the black veniremembers with her 19 allotted peremptory strikes. Thus, she challenged 71% of the black veniremembers, but only 21% of the white veniremembers.

These facts, standing alone, are sufficient to raise an inference of discrimination, but the inference is further strengthened by an additional fact. As the Court of Criminal Appeals observed, this prosecutor "has a history of using perremptory challenges to discriminate against black jurors." *Harris v. State*, 632 So.2d 503 (Ala.Crim.App.1992) (quoting *Hood v. State*, 598 So.2d 1022, 1024 (Ala.Crim.App.1991)). "An example of what appears to be a systematic practice of discrimination is a relevant factor to be considered both at the trial level and on review in assessing the strength of the defendant's *prima facie* case." *Ex parte Bird*, 594 So.2d 676, 681 (Ala.1991).

Notwithstanding these factors, the Court of Criminal Appeals determined that the defendant had failed to present a *prima facie* case of racial discrimination in jury selection, and, consequently, that the prosecutor was not required to justify her challenges. That court's disposition of this issue is inexplicable and erroneous, as is this Court's majority opinion, which, *sub silentio*, concurs in that court's conclusion.

The readiness of the judiciary to guard against inroads into constitutional guarantees must not depend on its assessment of the merits of the underlying case. I cannot, therefore, justify the conclusion that the facts presented by the defendant do not require us to remand

this cause for further proceedings at which the State would be required to explain its challenges. Consequently, I must respectfully dissent.

Supreme Court of Alabama.

Ex parte Louise HARRIS.

(In re Louise Harris

v.

State of Alabama).

1920374.

June 25, 1993.

On Application for Rehearing

PER CURIAM.

The issues raised on application for rehearing have been resolved by *Ex parte Giles*, 632 So.2d 577 (Ala.1993). The application is overruled.

APPLICATION OVERRULED.

MADDOX, ALMON, SHORES, ADAMS, HOUSTON, STEAGALL and INGRAM, JJ., concur.

SUPREME COURT OF THE UNITED STATES

No. 93-7659

Louise Harris,

Petitioner

v.

Alabama

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Alabama.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Questions 1 and 2 presented by the petition.

June 27, 1994

No. 93-7659

In The

Supreme Court of the United States

October Term, 1994

LOUISE HARRIS,

Petitioner,

vs.

STATE OF ALABAMA,

Respondent.

On Writ Of Certiorari
To the Supreme Court Of Alabama

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Is a death sentence invalid where a trial court overrides a jury's advisory verdict of life without parole, when the trial judge relies on no standard or norm to guide his consideration of the jury's verdict and when the appellate courts fail to scrutinize the propriety of the trial judge's override?

2. Does a capital sentencing scheme which requires trial courts to consider the jury's advisory sentencing verdict of life without parole without any direction or guidance and which results in arbitrary and inconsistent application of the death penalty violate the Eighth and Fourteenth Amendments?

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No. 93-7659

In The

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October Term, 1994

LOUISE HARRIS,

Petitioner,

vs.

STATE OF ALABAMA,

Respondent.

On Writ Of Certiorari
To the Supreme Court Of Alabama

BRIEF FOR PETITIONER

OPINIONS BELOW

The June 25, 1993 opinion of the Alabama Supreme Court is reported at *Ex parte Harris*, 632 So.2d 543 (Ala. 1993), and is reproduced in the joint appendix. (J.A. 103) The October 29, 1993 rehearing opinion of the Alabama Supreme Court is reported at *Ex parte Harris*, 632 So.2d 543, 547 (Ala. 1993), and is included in the joint appendix. (J.A. 111) The opinion and denial of rehearing by the Alabama Court of Criminal Appeals is reported at *Harris v. State*, 632 So.2d 503 (Ala.Crim.App. 1992), and is reproduced in the joint appendix. (J.A. 9)

JURISDICTION

A denial of rehearing was issued by the Alabama Supreme Court on October 29, 1993. A timely petition for writ of certiorari was filed in this Court on January 26, 1994 and certiorari was granted on June 27, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (3) (1986), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Alabama Code Section 13A-5-47(e) (1982) provides:

> In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict, unless such a verdict has been waived pursuant to section 13A-5-46(a) or 13A-5-46(g). While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.

STATEMENT OF THE CASE

Louise Harris, a thirty-six year-old African American mother of seven, was sentenced to death after an Alabama jury returned an advisory verdict of life imprisonment without possibility of parole. (R. 731-32, 1012) The jury made its sentencing determination after convicting Mrs. Harris of a single count of capital murder for her role in the slaying of her husband, Isaiah Harris, in March of 1988. (R. 953)[1] Before returning a sentencing verdict, the jury learned that Mrs. Harris had no prior involvement of any type with the criminal justice system, was a responsible parent, worked at three different jobs, and was active in her church. (R. 684, 689, 733, 995) The jury was instructed at the penalty phase that upon a weighing of aggravating and mitigating circumstances, it was to recommend a sentence of either death or life imprisonment without parole. (R. 975-78) On July 13, 1989, the jury

[1] Mrs. Harris was originally charged with two counts in the single killing, one for murder pursuant to a contract for hire or for pecuniary gain, Ala. Code § 13A-5-40(a)(7) (1982), and another for the murder of a law enforcement officer, Ala. Code § 13A-5-40 (a)(5) (1982), because her husband was employed as a Montgomery County deputy sheriff. The second count was dismissed, however, after a finding that Mr. Harris's occupation was irrelevant to a case about domestic issues. (R. 826)

by a vote of 7-5 rejected the death penalty and returned an advisory verdict of life imprisonment without parole. (R. 1012)

At a separate proceeding several weeks later, the trial judge found only the one aggravating circumstance included in the offense and numerous mitigating factors. (R. 1051; J.A. 4-7) Nevertheless, with only cursory mention of the jury's recommended sentence, the trial judge overrode its verdict and sentenced Mrs. Harris to death. (J.A. 2-8) The trial judge did not explain why he rejected the jury's recommendation nor what role, if any, its advisory verdict played in the sentencing decision. (J.A. 7-8)[2]

As is true in every other instance of override, neither the Alabama Court of Criminal Appeals nor the Alabama Supreme Court examined why the jury's advisory verdict was rejected in this case. (J.A. 89-93, 103) The Alabama Court of Criminal Appeals dismissed Mrs. Harris's contention that Alabama's standardless override scheme is unconstitutional and that rejection of the jury's advisory verdict in her case was arbitrary. (J.A. 89) The Alabama Supreme Court affirmed without comment. (J.A. 103-111)

The murder of Isaiah Harris was arranged by Lorenzo McCarter, who had been involved in an affair

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[2] The court signed a sentencing order prepared by the state. (R. 1254-55; State's Supplemental Record). After a hearing on March 7, 1991, at which the state moved posttrial to correct the sentencing order, the trial court agreed to modify its earlier order in accordance with the state's request. (State's Supplemental Record)

with Mrs. Harris. (R. 613, 738)[3] McCarter joined three of his friends in ambushing Mr. Harris as he drove by in his car on the way to work. (R. 624-30) Mr. Harris was killed instantly by a single gunshot. (R. 402) McCarter exchanged testimony for leniency and was the key witness against Mrs. Harris. (R. 602, 642)[4]

McCarter maintained that Mrs. Harris had asked him to kill her husband so that they could share his retirement benefits and that he had involved his friends in the deed at her behest. (R. 615) The state also presented testimony from the men whose involvement McCarter had solicited (R. 474, 479), as well as evidence of employment insurance benefits that would accrue to Mr. Harris's estate upon his death. (R. 560-61, 571-75, 582-83).

Mrs. Harris testified at the guilt phase of her trial that she had no knowledge of McCarter's plan to kill her

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[3] Mrs. Harris had been experiencing problems in her marriage for several years. She had left home briefly in late 1986 following an incident in which Mr. Harris hit her in the head and threatened her with a gun. (R. 731) Mrs. Harris filed for divorce but later reconciled with her husband. (R. 734-35) She entered into the affair with Lorenzo McCarter in the summer of 1987. (R. 737)

[4] McCarter was spared the death penalty due to his testimony and was sentenced by agreement with the state to life without parole. (R. 642) Two of McCarter's three friends in the car, Michael Sockwell and Alex Hood, were also tried and convicted of capital murder. (The third passenger, Freddie Patterson, was not charged. (R. 332)) Sockwell was sentenced to death by the trial court after the jury in his case recommended life without parole. *Sockwell v. State*, No. CR-89-225 (Ala.Crim.App. Dec. 30, 1993). Hood was sentenced to life without parole. *Hood v. State*, 598 So. 2d 1022 (Ala.Crim.App. 1991).

husband.[5] (R. 753-54) She also presented considerable evidence to the jury about her background and character. At the time of her arrest, she was raising seven children, four of whom were the biological children of Mr. Harris, who was her second husband. (R. 731-32) She was an avid churchgoer and involved the family in church activities. (R. 684, 689, 733) Witnesses testified that she held three jobs simultaneously, working at the First Baptist Church as well as in the private homes of two women prominent in the Montgomery community, including one for whom she had been employed for ten years. (R. 683, 695, 733) These and other witnesses attested to petitioner's "excellent" reputation in the community (R. 696) and her long-standing commitment to the church and to hard work.

SUMMARY OF ARGUMENT

Alabama is the only state in the country which requires the participation of both jury and judge in capital sentencing but fails to regulate the relationship between the two decisionmakers. Alabama law recognizes the jury as a significant partner in the sentencing process. Ala. Code § 13A-5-46 (1982); *Ex parte Williams*, 556 So. 2d 744 (Ala. 1987). Yet the role of the advisory

[5] Mrs. Harris was at home with her children at the time of the murder. (R. 432, 748-752) The state argued for petitioner's involvement on the ground that she called McCarter after her husband had left for work to alert him to his whereabouts. Mrs. Harris testified that she called McCarter at that time regularly. (R. 749-50) McCarter concurred in this. (R. 659)

jury verdict in capital sentencing remains indeterminate. The trial judge who takes issue with a jury's recommendation of life-without-parole is provided with no direction regarding the role that recommendation should play in the ultimate determination of punishment. Ala. Code § 13A-5-47(e) (1982) (stating only that advisory verdict must be "considered"); *Sockwell v. State*, No. CR-89-225 (Ala.Crim.App. Dec. 30, 1993), slip op. at 50 (no Alabama law specifies weight to be accorded advisory verdict); *Hadley v. State*, 575 So. 2d 145, 158 (Ala.Crim.App. 1990) (Alabama has yet to formulate standard).

The result has been the arbitrary and inconsistent treatment of the jury's advisory life verdict that is in evidence in Louise Harris's case. Absent direction, trial courts randomly assess the jury's function in the process: some treat the life recommendation as a mitigating factor; others consider it separately from the aggravation/mitigation analysis; some accord great deference to the jury's life recommendation; others barely reference it in their sentencing orders. The judge who sentenced Mrs. Harris to death arbitrarily assigns a different role to the advisory verdict depending on the case before him. In petitioner's case, he did not find the recommendation mitigating, and gave it only passing reference in his order sentencing her to death. (J.A. 2-8) What function, if any, the jury's sentence played and why it was rejected were never explained.

The failure to regulate the relative functions of the sentencing jury and judge has allowed an arbitrary element to enter into an otherwise regularized process.

Because Alabama trial judges use haphazard and capricious procedures in assessing and rejecting jury life recommendations, it is impossible to distinguish rationally between those who receive death and those who do not. *Spaziano v. Florida*, 468 U.S. 447, 460 (1984). The absence of any written findings regarding the role the recommendation played or the reasons for its rejection deprives the appellate courts of an avenue for rational review. *Arave v. Creech*, 113 S. Ct. 1534, 1540 (1993); *Proffitt v. Florida*, 428 U.S. 242, 251 (1976). This inconsistent consideration of the jury's life verdict in Alabama violates the Eighth Amendment prohibition against arbitrariness and caprice in capital sentencing.

The Alabama appellate courts have not acted to save the statute from the infirmities of inconsistent application. The Alabama Court of Criminal Appeals and the Alabama Supreme Court have failed to scrutinize death sentences following jury life recommendations and have never reversed a sentence of death due to improper judicial override. Despite the importance of meaningful appellate review in death penalty cases, *Clemons v. Mississippi*, 494 U.S. 738, 749 (1990), they have sanctioned a process that is both arbitrary and applied without an even hand. *Sochor v. Florida*, 112 S. Ct. 2114 (1992); *Parker v. Dugger*, 498 U.S. 308 (1991).

Louise Harris was sentenced to death after arbitrary consideration of the jury's life-without-parole verdict. The imposition and affirmance of her death sentence pursuant to an unpredictable and capricious process violated the most basic of Eighth and Fourteenth Amendment guarantees.

ARGUMENT

I. THE EIGHTH AND FOURTEENTH AMENDMENTS PROHIBIT DEATH SENTENCES OBTAINED ON THE BASIS OF ARBITRARY PROCEDURES.

This Court has only recently reaffirmed the "one principle" common to its Eighth Amendment decisions governing state procedures for administering the death penalty: "The State must ensure that the process is neutral and principled so as to guard against bias or caprice in the sentencing decision." *Tuilaepa v. California*, 114 S. Ct. 2630, 2635 (1994). The states have broad latitude to shape their death-sentencing practices as they see fit, *Spaziano v. Florida*, 468 U.S. 447, 464 (1984), but "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980).

"It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice." *Gardner v. Florida*, 430 U.S. 349, 358 (1977).[6] "If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." *Spaziano v. Florida*, 468

[6] *See also Zant v. Stephens*, 462 U.S. 862, 885 (1983); *Johnson v. Mississippi*, 486 U.S. 578, 585 (1988); *Romano v. Oklahoma*, 114 S.Ct. 2004, 2009 (1994).

U.S. at 460.[7] This is why the Court's opinions have repeatedly emphasized " 'procedural protections . . . intended to ensure that the death penalty will be imposed in a consistent, rational manner.' " *Lewis v. Jeffers*, 497 U.S. 764, 776 (1990) (quoting *Barclay v. Florida*, 463 U.S. 939, 960 (1983) (Stevens, J., concurring)). The reiterated commands that the states "regularize, and make rationally reviewable the process for imposing a sentence of death," *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976)[8], that they rectify "procedural rules that tended to diminish the reliability of the sentencing determination," *Beck v. Alabama*, 447 U.S. 625, 638 (1980),[9] and that they ensure "measured, consistent application and fairness to the accused," *Eddings v. Oklahoma*, 455 U.S. 104, 111 (1982),[10] reflect complementary formulations of the same fundamental point: that "death penalty statutes must be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion." *California v. Brown*, 479 U.S. 538, 541 (1987).

While one important reflection of this point has been the line of cases invalidating unduly vague criteria for

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[7] *See also Lockett v. Ohio*, 438 U.S. 586, 601 (1978); *Parker v. Dugger*, 498 U.S. 308, 321 (1991).

[8] *See also Arave v. Creech*, 113 S. Ct. 1534, 1540 (1993); *Lewis v. Jeffers*, 497 U.S. at 774.

[9] *See also Woodson*, 428 U.S. at 305; *Mills v. Maryland*, 486 U.S. 367, 383-84 (1988); *Simmons v. South Carolina*, 114 S. Ct. 2187, 2198 (1994) (Souter, J., concurring). *See also McKoy v. North Carolina*, 494 U.S. 433, 454 (1990) (Kennedy, J., concurring).

[10] *See also Spaziano v. Florida*, 468 U.S. at 459; *Clemons v. Mississippi*, 494 U.S. 738, 749 (1990).

eligibility for capital sentencing and unduly vague selection standards, *see, e.g., Godfrey v. Georgia*, 446 U.S. 420 (1980); *Maynard v. Cartwright*, 486 U.S. 356 (1988); *Stringer v. Black*, 112 S.Ct. 1130 (1992); *Espinosa v. Florida*, 112 S.Ct. 2926 (1992) (per curiam)), these cases merely exemplify the fundamental principle and do not exhaust it. Time and again the Court has held that the interjection of any potentially decisive arbitrary factor into the capital sentencing process affronts the Eighth Amendment's concern for principled and consistent administration of the death penalty.[11]

For example, in *Gardner v. Florida*, the sentencing judge's *ex parte* consideration of an undisclosed presentence investigation report threatened to introduce such an arbitrary factor into Gardner's sentencing. This Court invalidated Gardner's death sentence, stating that:

> Since the State must administer its capital-sentencing procedures with an even hand it is important that the record on appeal disclose to the reviewing court the considerations which motivate the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida capital sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in *Furman v. Georgia* [,408 U.S. 238 (1972)].

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[11] *See, e.g., Arave v. Creech*, 113 S. Ct. 1534, 1542 (1993) ("When the purpose of a statutory aggravating circumstance is to enable the sentencer to distinguish those who deserve capital punishment from those who do not, the circumstance must provide a principled basis for doing so.") *See also Godfrey v. Georgia*, 446 U.S. at 433; *Maynard v. Cartwright*, 486 U.S. at 362.

Gardner v. Florida, 430 U.S. at 361 (citation omitted).[12]

In *Beck v. Alabama*, 447 U.S. 625 (1980),[13] the withdrawal from a capital jury's consideration of lesser included offenses supported by the evidence created the likelihood that crime-concerned jurors would irrationally over-convict rather than under-convict when given no third option. The intrusion of this single, potentially persuasive arbitrary factor into the process leading to a death sentence was sufficient to invalidate the Alabama procedure because it offended the Eighth Amendment's concern for "reliability in the determination that death is the appropriate punishment" in each individual case. Id. at 638 n.13.[14] In *Sochor v. Florida*, 112 S. Ct. 2114 (1992), and *Johnson v. Mississippi*, 486 U.S. 578 (1988), still another single but potentially decisive arbitrary factor – a factually unfounded or undermined aggravating circumstance

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[12] "We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." *Parker v. Dugger*, 498 U.S. 308, 321 (1991); *see also Clemons v. Mississippi*, 494 U.S. at 749; *Gregg v. Georgia*, 428 U.S. 153, 206 (1976).

[13] The *Beck* decision required that Alabama restructure its capital sentencing procedures. This was done by judicial decision in 1981. *See Beck v. State*, 396 So. 2d 645 (Ala. 1981). Later that year the Alabama Legislature codified the changes *Beck* wrought and amended the statute to include the *Beck* provisions affirming the jury's sentencing role. *See* Ala. Code § 13A-5-46 (1982); *see also infra* at 17.

[14] In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the same concern was held to require the invalidation of a death sentence potentially influenced by another kind of arbitrary factor: a jury's possible willingness to abdicate responsibility for its life-or-death decision when misinformed about the scope of judicial review of that decision.

– was found sufficient to require the invalidation of death sentences resulting from an otherwise adequately regulated capital sentencing procedure.[15]

In short, it is plain that the Eighth Amendment will not countenance death sentences produced by a process in which an uncontrolled, unreviewable, capricious factor may have affected the life-or-death sentencing decision.

In *Parker v. Dugger*, 498 U.S. 308 (1991), the Court applied this principle both to the appellate review stage of the capital sentencing process and to the allocation of responsibility between capital sentencing decision-makers. Because the Florida Supreme Court had arbitrarily affirmed a trial court's rejection of a jury's advisory verdict of life imprisonment, this Court held that Parker had been subjected to an irrational and capricious death-sentencing procedure and reversed his sentence. *Id.* at 321-22. The result plainly would have been the same had the Florida Supreme Court failed persistently to ensure proper allocation of authority instead of only episodically as evidenced in Parker's case.

Yet this is precisely what the Alabama trial and appellate courts have done in cases of override generally and in Louise Harris's case in particular. Alabama has the only capital sentencing scheme in the nation which requires the participation of both jury and judge but fails to regulate the relationship between the two decisionmakers.[16] In the

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[15] *See also Stringer v. Black*, 112 S.Ct. 1130 (1992); *Espinosa v. Florida*, 112 S.Ct. 2926 (1992).

[16] The involvement of both jury and judge is mandated in only four death penalty jurisdictions: Florida, Indiana, Delaware, and Alabama. Fla. Stat. Ch. 921.141 (1991); Ind. Code

absence of any such regulation, jury recommendations of life without parole have played unpredictable and indeterminate roles in the sentencing process and have been rejected for reasons that remain wholly undisclosed.[17] The arbitrary and unreviewable treatment of the jury's advisory verdict in Louise Harris's case fundamentally tainted the process by which she was sentenced to death. *See Gardner v. Florida*, 430

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§ 35-50-2-9(e) (1986); Del. Code Ann. tit. 11 § 4209(d) (1979); Ala. Code §§ 13A-5-42 to -47 (1982). The supreme courts of Florida and Indiana have set forth standards regulating the roles of jury and judge. When the two reach differing assessments as to punishment, the function of the jury's life recommendation in the final determination of sentence is clear: the advisory life verdict can be set aside only if "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975); *see also Martinez-Chavez v. State*, 534 N.E.2d 731, 735 (Ind. 1989) (for judge to impose death after jury life recommendation, "facts justifying a death sentence should be so clear and convincing that virtually no reasonable person could disagree that death was appropriate").

Delaware, which only recently required both jury and judge to participate in capital sentencing, appears also to be adopting the *Tedder* standard for governing disagreements between decisionmakers. *See Pennell v. State*, 604 A.2d 1368, 1377-78 (Del. 1992). There have to date been no death sentences imposed under Delaware's new statute after jury life recommendations.

[17] Life without parole and death are the only sentencing options for a defendant convicted of capital murder in Alabama. Ala. Code § 13A-5-45 to -47 (1982). Judicial rejection of advisory verdicts of death do not pose a problem under the Eighth and Fourteenth Amendments. *See Gregg v. Georgia*, 428 U.S. 153, 199 (1976) (at various stages of process, actors make decisions to remove defendant from consideration as candidate for death penalty; Eighth Amendment concerned not with this result but with minimizing risk that death penalty imposed on capriciously selected group).

U.S. at 358 (defendant has legitimate interest in character of procedure leading to imposition of death).

II. ALABAMA'S CAPITAL SENTENCING SYSTEM REQUIRES THE PARTICIPATION OF BOTH JURY AND JUDGE.

The Alabama Legislature and the Alabama Supreme Court have evinced a clear commitment to maintaining the role of the jury in capital sentencing proceedings. Drawing on the substantial part jurors have historically played in Alabama's capital sentencing process,[18] state law requires that the jury recommendation ensue only from carefully tailored and protected procedures.

The signal importance of the jury function in capital sentencing was set out most explicitly by the Alabama Supreme Court in its seminal opinion on the death penalty, *Beck v. State*, 396 So. 2d 645 (Ala. 1981). *Beck* followed this Court's opinion in *Beck v. Alabama*, 447 U.S. 625 (1980), which, as noted above, invalidated the Alabama statute then in operation to the extent that it precluded the jury's consideration of lesser included offenses. In

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[18] Alabama has in essence a trifurcated system for sentencing defendants to death. A jury first determines whether an accused is eligible for the death penalty by reaching a decision regarding guilt or innocence. Ala. Code § 13A-5-43 (1982). If a defendant is found guilty of a capital offense, the case then moves to a sentencing hearing before the same jury. Ala. Code §§ 13A-5-45, -46 (1982). After hearing evidence and argument, the jury provides a penalty recommendation to the trial court which imposes sentence. Ala. Code §§ 13A-5-46(d),(g), -47 (1982).

determining how the sentencing scheme could be restructured, the supreme court dismissed the state's contention that under Alabama constitutional and common law the judge could sentence without jury participation. *See Beck v. State*, 396 So. 2d at 660 (solution to problem "cannot be effected by the elimination of the jury's participation in the sentencing process"). Invoking not only legislative intent but also Alabama's long history of capital jury sentencing,[19] the court declared:

> While the jury is not the final sentencing authority under the capital sentencing scheme set out in the statute, the requirement that the jury fix the punishment was deliberately included in the statute by the legislature. . . . [W]e believe that the legislature intended to have jury input in the sentencing process. Throughout Alabama's history, juries have always played a major role in capital cases.

Id. at 659. *See also Prothro v. State*, 370 So. 2d 740, 743 (Ala.Crim.App. 1979) (jury function in capital cases has been "assiduously . . . guarded" throughout the years).

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[19] *Beck* examined the jury role as established by state penal codes dating back to the early 1800s. In the early nineteenth century death sentences were mandatory following a jury determination of guilt for certain offenses. *Id.* at 648-49. Each of the ten statutes considered by the *Beck* court from the 1840s until the law was revised in 1975 required the jury to make the capital sentencing decision under a grant of discretion. *Id.* at 649-652. *See, e.g.*, Ala. Code § 15-15-24(a) (1982) ("The court shall not in any event, however, impose capital punishment without the intervention of a jury.")

The Alabama statute presently in operation codified the jury's participation in capital sentencing.[20] The Alabama Legislature fashioned Alabama's sentencing scheme around the unique importance attributed to the jury role in the state as consistently reflected in legislative and common law traditions.[21] *See also Johnson v. State*, 502 So. 2d 877, 879 (Ala.Crim.App. 1987) (jury plays "key role" in sentencing phase of capital case, as is clear in *Beck*); *Edwards v. State*, 452 So. 2d 487, 493 (Ala.Crim.App. 1982), *rev'd on other grounds*, 452 So. 2d 503 (Ala. 1983) (*Beck* makes clear that jury participates in sentencing scheme).

The jury's "key" role in sentencing is manifest in the statutory procedures outlining its participation[22] and in

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[20] Alabama's current capital statute was amended in 1981 to address *Beck*. One pertinent difference between the present law and the statute *Beck* addressed is that a trial court's ability to reject a jury verdict of life-without-parole is now permitted by statute, Ala. Code § 13A-5-47 (1982), whereas that power under the earlier law was made express by judicial ruling. *See Ex parte Hays*, 518 So. 2d 768, 775-76 (Ala. 1986).

[21] Alabama's unbroken adherence to the involvement of a jury in any capital sentencing procedure has led to the unusual requirement that a judge cannot accept a plea of guilty to a capital offense and impose a life-without-parole punishment without jury participation. Ala. Code § 13A-5-42 (1982). *See also Youngblood v. State*, 372 So. 2d 34 (Ala.Crim.App. 1979) (trial court in capital case could neither determine guilt nor fix punishment of defendant without intervention of jury, even though defendant sought to plead guilty); *Prothro v. State*, 370 So. 2d at 746 (Alabama law does not permit trial court, without jury, to fix punishment in capital case).

[22] The statute requires a full hearing that must comport with due process and that provides the jury with every element

the case law interpreting them. That Alabama law views the jury as a vital partner in the punishment determination is evident in its refusal to allow legal errors in the jury proceeding to go uncorrected. Although the judge is the final sentencing authority, instructional and evidentiary errors of law before the sentencing jury will require reversal even if not replicated before the sentencing judge.

For example, in *Ex parte Williams*, 556 So. 2d 744 (Ala. 1987), the sentencing jury had been instructed that it could consider the aggravating circumstance that Williams was under sentence of imprisonment at the time of his crime. Ala. Code § 13A-5-49(1) (1982). In fact, Williams had not been on probation as the jury had been told, and the trial court did not find this aggravating circumstance when sentencing him to death. *Ex parte Williams*, 556 So. 2d at 745. The state argued that the error should be deemed harmless due to the proper consideration of the issue by the judge. The state's high court rejected this reasoning.

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traditionally associated with a penalty phase proceeding. *Richardson v. State*, 376 So. 2d 205 (Ala.Crim.App. 1978), *aff'd*, 376 So. 2d 228 (Ala. 1979). After hearing evidence, argument, and instruction, Ala. Code § 13A-5-46(d) (1982), the panel must have sufficient votes to reach a capital sentencing determination (ten votes for death or seven for life) or a mistrial is declared and a new jury empaneled. Ala. Code §§ 13A-5-46(f),(g) (1982). (The jurors must, of course, be death-qualified, *see Edwards v. State*, 452 So. 2d at 493, and must be "life-qualified" upon request by the defense. *Bracewell v. State*, 506 So. 2d 354, 358 (Ala.Crim.App. 1986)). The jury's participation can be waived only if both parties and the judge concur. Ala. Code § 13A-5-46(c) (1982).

The basic flaw in this rationale is that it totally discounts the significance of the jury's role in the sentencing process.

The legislatively mandated role of the jury in returning an advisory verdict, based upon its consideration of aggravating and mitigating circumstances, can not be abrogated by the trial court's errorless exercise of its equally mandated role as the ultimate sentencing authority. Each part of the sentencing process is equally mandated by the statute (§§ 13A-5-46, -47(e)); and the errorless application by the court of its part does not cure the erroneous application by the jury of its part. . . . To hold otherwise is to hold that the sentencing role of the jury, as required by statute, counts for nothing so long as the court's exercise of its role is without error.

Id. (emphasis added)

This has been the consistent response when the jury's role has been in some fashion undermined during the penalty phase. When juries have been improperly instructed, as in *Williams*, Alabama law has required a new jury sentencing. *See, e.g., Ex parte Stewart*, No. 1920509 (Ala. Sept. 3, 1993); *Jefferson v. State*, 473 So. 2d 1100 (Ala.Crim.App. 1984), *cert. denied*, 479 U.S. 922 (1986); *see also Hallford v. State*, 548 So. 2d 536 (Ala.Crim.App. 1988) (jury must be given limiting instruction on heinous, atrocious or cruel aggravating factor). New jury hearings have also been ordered where improper argument might have influenced deliberations, *see, e.g., Guthrie v. State*, 616 So. 2d 914, 932 (Ala.Crim.App. 1993) ("We see this as a clear infringement upon the jury's important and critical discretion in

determining whether to recommend a sentence of death or of life imprisonment without parole."); *Ex parte Rutledge*, 482 So. 2d 1262, 1263-65 (Ala. 1984); *Ex parte Whisenant*, 482 So. 2d 1247, 1249 (Ala. 1984), *cert. denied*, 496 U.S. 943 (1990), or where improper evidence was presented to the jury at the penalty phase. *See, e.g., McGahee v. State*, 554 So. 2d 454, 471 (Ala.Crim.App. 1989), *aff'd*, 554 So. 2d 473 (Ala. 1989); *see also Coulter v. State*, 438 So. 2d 336, 349 (Ala.Crim.App. 1982).

III. THE FAILURE TO PROVIDE STANDARDS GOVERNING THE ROLES OF JURY AND JUDGE HAS LED TO ARBITRARY CONSIDERATION BY TRIAL COURTS OF JURY VERDICTS OF LIFE-WITHOUT-PAROLE.

Despite the recognition that the jury is a significant partner in Alabama's capital sentencing scheme, neither the statute nor the courts have provided a mechanism for governing the jury's decisionmaking authority relative to that of the judge. The statute's sole mention of the role of the jury in the ultimate imposition of sentence is to say that the trial court "shall consider the recommendation of the jury contained in its advisory verdict." Ala. Code § 13A-5-47(e) (1982). Stating simply that the jury verdict is not binding, *id.*, the statute is silent as to how the trial court is to make the recommendation a part of the decisionmaking process or what role the jury's decision should play if there is disagreement as to sentence.

Unlike the supreme courts of Florida, Indiana, and Delaware,[23] the Alabama Supreme Court has not furnished that guidance. The appellate courts have acknowledged that no definition has been given to the relative roles of the two decisionmakers. *See, e.g., Sockwell v. State*, No. CR-89-225 (Ala.Crim.App. Dec. 30, 1993), slip op. at 50 (no Alabama law specifies weight trial court is to accord jury's advisory sentence); *State v. Taylor*, No. CR-92-1313 (Ala.Crim.App. July 8, 1994), slip op. at 28 n.3 (same); *Hadley v. State*, 575 So. 2d 145, 158 (Ala.Crim.App. 1990) ("Alabama Supreme Court has yet to formulate a distinct standard") (quoting *Martinez-Chavez v. State*, 534 N.E.2d 731, 734 n.2 (Ind. 1989)).[24]

A. IN IMPOSING SENTENCES OF DEATH, TRIAL COURTS USE ERRATIC METHODS AND APPLY WHIMSICAL STANDARDS IN ASSESSING THE FUNCTION OF THE JURY'S LIFE-WITHOUT-PAROLE PENALTY VERDICT.

The absence of guidance has led Alabama trial courts[25] to confront the advisory verdict in unpredictable

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[23] *See supra* note 16.

[24] *See* Colquitt, *The Death Penalty Laws of Alabama*, 33 Ala. L. Rev. 13, 328 (1981) (trial judge's seminal analysis of Alabama's capital statute, in which it is noted that "Alabama appellate courts can reasonably be expected to develop and apply restrictions to a trial judge's power to reject a sentence recommended by a jury").

[25] Circuit court judges, who face partisan elections every six years, adjudicate Alabama capital cases. Ala. Code § 17-2-7 (1982).

ways and to accord it arbitrary degrees of deference. Treatment of the jury's role varies widely from judge to judge, and, as in petitioner's case, even from one defendant to another sentenced by the same judge. Mrs. Harris was sentenced to death following cursory reference to the jury's contrary recommendation and pursuant to an arbitrary process.

1. The life verdict is treated in an arbitrary and random fashion: sometimes as a mitigating factor to be weighed against aggravation, and sometimes in an undisclosed manner.

A central confusion among Alabama sentencing judges is whether an advisory verdict of life without parole is a mitigating circumstance to be weighed with statutory and other nonstatutory mitigation against aggravation.[26] A number of trial judges explicitly define the jury verdict as such and weigh it directly into the balance of factors. *See, e.g., State v. Bush*, No. CC-81-1335 (Montgomery County 1991); *State v. Duncan*, No. CC-87-271 (Dallas County 1988); *State v. Musgrove*, No. CC-83-1476FL (Madison County 1985); *see also State v. Myers*, No. CC-91-988 (Morgan County 1994) (jury life

[26] A copy of all judicial override sentencing orders in Alabama has been lodged in the Clerk's office for the convenience of the Court. A review of these orders reveals that 95% of all overrides in Alabama involve rejection of jury recommendations of life without parole in favor of death. A great number of those whose life verdicts were overridden are, for various reasons, no longer on Alabama's death row.

verdict "single strongest mitigating factor"). Some Alabama judges who deem the jury recommendation "mitigating" appear to do so in the belief that the statute requires as much.[27] *See, e.g., State v. Murry*, No. CC-82-211G (Montgomery County 1982) (stating belief that jury verdict can only be considered as mitigator).

Many courts, however, do not treat the verdict as mitigation. Several have rejected it after finding no nonstatutory mitigating circumstances. *See, e.g., State v. Crowe*, No. CC-83-2727 (Jefferson County 1984); *State v. Harrell*, No. 82-1147 (Jefferson County 1983); *State v. Jones*, No. CC-81-610 (Baldwin County 1982). Others make clear that the verdict was not one of the mitigating circumstances considered. This was true in petitioner's case. (J.A. 6-7).[28]

There are other courts, however, that consider the jury's recommendation according to a wholly different

[27] The Alabama statute directs trial courts only as to the weighing of aggravation and mitigation. Ala. Code § 13A-5-47(e) (1982).

[28] Still other courts strive to resolve their dilemma by viewing the advisory verdict not as a full mitigating circumstance under the law but as an "aspect" of mitigation that still must somehow be made part of the weighing process. *See, e.g., State v. Johnson*, No. CC-84-0331 (Morgan County 1985) (jury verdict an "aspect of mitigation separate and apart and in addition to" statutory and nonstatutory factors); *State v. McMillian*, No. CC-87-137 (Monroe County 1988) (jury verdict weighed independently as aspect of mitigation separate and apart from other factors); *see also State v. Owens*, No. CC-84-455 (Russell County 1985) ("The Court finds that the aggravating circumstances outweigh the mitigating circumstances when the jury recommendation of life without parole is also taken into consideration.")

procedure. Their sentencing orders indicate that they do not attempt to factor the advisory verdict into the aggravation/mitigation inquiry at all, but rather take it into consideration in some separate and distinct manner. While it is possible that these judges view the jury's advisory sentence as functioning in a fashion similar to their own, it is unknown what role the recommendation played in these cases.[29] *See, e.g., State v. Neelley*, No. CC-82-276 (DeKalb County 1983) (court has "weighed the aggravating and mitigating circumstances . . . and has given consideration to the recommendation of the jury"); *see also State v. Flowers*, No. CC-89-65 (Baldwin County 1990); *State v. McNair*, No. 90-086 (Henry/Montgomery Counties 1993).

These inconsistent practices are in evidence not only across courtrooms but also in the treatment of different defendants by a single judge. Judge Randall Thomas, who sentenced Mrs. Harris to death, stated only at the outset of the sentencing order in her case that he had "considered" the jury's advisory verdict. (J.A. 2). The verdict was not treated as a mitigating factor, and there is no discussion of how it may have figured into the decision to impose death. The sentencing order of the codefendant, Michael Sockwell, is substantially identical to petitioner's and includes only the same perfunctory mention of the jury's advisory life verdict. *State v. Sockwell*, No. CC-88-1244-HRT (Montgomery County 1991). However, in overriding the jury's verdict in the case of Robert

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[29] *See Godfrey v. Georgia*, 446 U.S. at 429 (sentencer's interpretation of factor matter of "sheer speculation").

Coral, the same judge listed the jury's verdict as a mitigating factor and further stated that he gave it "great weight." *State v. Coral*, No. CC-88-741 (Montgomery County 1992). Judge Thomas similarly treated the life verdict as mitigating in a fourth case in which he overrode. *State v. Hooks*, No. CC-85-588-TH (Montgomery County 1986).

There is no discernible distinguishing principle as to why the trial court should have considered the verdict a mitigating factor in some cases yet not in Mrs. Harris's. *See Spaziano v. Florida*, 468 U.S. at 460 (state must administer death penalty in way that can rationally distinguish between those for whom death is appropriate and those for whom it is not); *Maynard v. Cartwright*, 486 U.S. 356, 363 (1988) (citing *Godfrey v. Georgia*, 446 U.S. at 433) (where statute did not provide restraint on arbitrariness, there was no principled way to distinguish between those who received death and those who did not). The judge who sentenced petitioner to death offered the appellate courts no explanation to review[30] regarding the whimsical treatment accorded jury verdicts in his courtroom.[31] *Lewis v. Jeffers*, 497 U.S. at 774.

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[30] Alabama trial courts are not required to include findings on why the jury recommendation was rejected in the written sentencing orders mandated by statute. Ala. Code § 13A-5-47 (1982). *See Proffitt v. Florida*, 428 U.S. 242, 251 (1976) (meaningful appellate review made possible by trial court's written findings); *Gardner v. Florida*, 430 U.S. at 360-61 (record on appeal must disclose considerations which motivated death sentence; absence of full disclosure of basis for death sentence undermines appellate review).

[31] The unpredictability with regard to how the advisory verdict will function in a given case also presents notice problems

2. The function the jury's life recommendation serves in the judge's sentencing determination is unpredictable.

Alabama trial courts are also manifestly inconsistent in the function they assign to the jury's life-without-parole determination. Some judges assign none: they impose a sentence of death without even acknowledging in the sentencing order that the jury returned a life verdict. *See, e.g., State v. Turner*, No. CC-83-340-SW (Etowah County 1983). In some cases, the jury's recommendation appears to have played no role in the judge's sentencing determination, but is simply reported in the order. *See, e.g., State v. Lindsey*, No. CC-82-212 (Mobile County 1982) (court "judicially aware" of advisory verdict). In others the court states no more than that it "considered" the jury's contrary verdict without appearing to have accorded it any significance. *See, e.g., State v. McGahee*, No. CC-85-251 (Dallas County 1992); *State v. Sockwell*, No. CC-88-1244-HRT (Montgomery 1991); *State v. Starks*, No. CC-88-23 (Pike County 1989).

On the other hand, some courts read the statute to require that the jury's sentencing determination be given great deference. *See, e.g., State v. Knotts*, No. CC-91-2537-PR (Montgomery County 1993); *State v. Wesley*, No. 83-2501-FDM (Mobile County 1988); *State v. Williams*, No. CC-88-2742 (Mobile 1990); *State v. Gentry*, No. CC-89-1345

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for a defendant who seeks to advocate effectively for a life-without-parole verdict at the judicial sentencing stage. *See Gardner v. Florida*, 430 U.S. at 360 (counsel must have opportunity to comment on facts which may influence sentencing decision); *see also Lankford v. Idaho*, 500 U.S. 110 (1991).

(Jefferson County 1992); *State v. Neelley*, No. CC-82-276 (DeKalb County 1983). A few Alabama judges seem to reject the jury's advisory life verdict only when a death sentence appears to them indisputable. *See, e.g., State v. Frazier*, No. CC-85-3291 (Mobile County 1986) ("if this were not a proper case for the death penalty to be imposed, a proper case could scarcely be imagined"); *see also Ex parte Hays*, 518 So. 2d 768, 777 (Ala. 1986) (agreeing that jury life recommendation was "unquestionably a bizarre result"), *cert. denied*, 485 U.S. 929 (1988).[32]

Lacking any direction regarding the role the jury verdict should play, some judges appear to be groping for a standard. In *State v. Murry*, for example, the court rejected the advisory verdict for life in the first trial and, following a reversal on appeal, accepted it in the second. In the first case, the court initially discussed the jury's determination as that of a separate sentencing body that was entitled to great weight; then employing a different approach, it went on to decide that it could "only categorize the recommendation as a mitigating circumstance given the broad definition of a mitigating circumstance." *State v. Murry*, No. CC-82-211G (Montgomery County 1982). After the second trial, the same judge created a different role for the recommendation after stating that it was "unaware of any reported decision which suggests

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[32] This approach resembles Florida's standard. *See Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975) (facts for death must be "so clear and convincing that virtually no reasonable person could differ" before a jury life recommendation can be rejected).

how much weight [should] be accorded an advisory verdict." *State v. Murry*, No. CC-82-211G (Montgomery County 1989).

The function given the jury's life verdict is again inconsistent even within the practice of a single judge: petitioner's judge apparently gave the jury recommendation no weight in her case, (J.A. 2-8), but "great weight" in another. *State v. Coral*, No. CC-88-741 (Montgomery County 1992). Why the significance of a jury life recommendation, fundamentally distinct in nature from a fact about the crime or the defendant, should change from case to case was never made known.[33]

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[33] Unlike the judge who sentenced Mrs. Harris to death, certain Alabama trial judges interpret the jury role to be significant enough as to require some explanation prior to rejection. *See, e.g., State v. Crowe*, No. CC-83-2727 (Jefferson County 1984) (jury must have reached improper determination; two aggravating circumstances were established by evidence while there were no mitigating circumstances as a matter of law); *State v. Boyd*, No. CC-86-454 (Calhoun County 1987) (jury may have been emotionally influenced by defense evidence during penalty phase); *State v. Burgess*, No. CC-94-781 (Jefferson County 1994) (jury appears to have relied on evidence that trial court does not deem mitigating); *State v. Parker*, No. CC-88-105 (Colbert County 1991) (same). These courts would appear to construe the override power as dependent in some measure on finding a flaw in the jury's separate process. Others, on the contrary, override the life verdict after explicitly stating that the jury had performed its role well. *See, e.g., State v. Jones*, No. CC-81-610 (Baldwin County 1982) (court in overriding not "chastising" jury); *State v. Neal*, No. CC-87-520 (Baldwin County 1990) (jury not "lax in its responsibility").

3. Louise Harris's death sentence followed arbitrary treatment of the jury's life-without-parole sentencing recommendation.

The Montgomery County trial judge sentenced Mrs. Harris to death after finding a single aggravating factor included in the offense itself, Ala. Code § 13A-5-49(6) (1982), and numerous mitigating circumstances, both statutory and nonstatutory. (J.A. 5-7). The sentencing order indicated only that the jury's recommendation was "considered" and was not accorded the weight or mitigating effect given the advisory life verdict in other cases. While the way in which the trial court treated the recommendation may have been decisive in its decision to reject it, that process was not disclosed and was not subject to review. The imposition of death in this case was arbitrary. *Spaziano v. Florida*, 468 U.S. at 465-66 (result of sentencing process in override case must not be arbitrary or discriminatory).

B. THE ALABAMA COURT OF CRIMINAL APPEALS AND ALABAMA SUPREME COURT HAVE PROVIDED PERFUNCTORY REVIEW IN JURY OVERRIDE CASES GENERALLY AND IN LOUISE HARRIS'S CASE PARTICULARLY.

The Alabama courts have never reversed a death sentence due to unwarranted rejection of the jury's

sentencing decision.[34] They have affirmed sentences of death without even a reference to the fact that the jury returned a life-without-parole verdict. *See, e.g., Stephens v. State*, 580 So. 2d 11, 25-26 (Ala.Crim.App. 1990), *cert. denied*, 112 S. Ct. 176 (1991). Often, no more than passing mention is given to the fact that a jury recommended life without parole: no review is undertaken to see if that recommendation was even considered. *See, e.g., Neelley v. State*, 494 So. 2d 669, 680 (Ala.Crim.App. 1985) (court states that "[t]he jury imposed a sentence of life without parole" in assessing a challenge under *Witherspoon v. Illinois*, 391 U.S. 510 (1968); no further mention is made of sentence), *cert. denied*, 480 U.S. 926 (1987); *Turner v. State*, 521 So. 2d 93, 94 (Ala.Crim.App. 1987) ("He was found guilty of the capital offense, and, after a sentencing hearing, the jury recommended that he be punished by life

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[34] The courts have sustained challenges to the override either by noting that it is allowed by statute, *see, e.g., Harrell v. State*, 470 So. 2d 1303, 1309 (Ala.Crim.App. 1984), *cert. denied*, 474 U.S. 935 (1985); *Jones v. State*, 456 So. 2d 366, 373 (Ala.Crim.App. 1983), *cert. denied*, 470 U.S. 1062 (1985); *Ex parte Lindsey*, 456 So. 2d 393, 394 (Ala. 1984), *cert. denied*, 470 U.S. 1023 (1985); or by citing to this Court's decisions in *Proffitt v. Florida*, 428 U.S. 242 (1976) or *Spaziano v. Florida*, 468 U.S. 447 (1984) approving the placing of sentencing authority in two decision-makers. *See, e.g., Crowe v. State*, 485 So. 2d 351, 364-65 (1984), *rev'd on other grounds*, 485 So. 2d 373 (1986); *Frazier v. State*, 562 So. 2d 543, 550 (Ala.Crim.App. 1989), *rev'd on other grounds*, 562 So. 2d 560 (Ala. 1989); *Williams v. State*, 627 So. 2d 985, 992 (Ala.Crim.App. 1991), *cert. denied*, 114 S. Ct. 1387 (1994). The Alabama courts have disregarded the Florida system's *Tedder* standard as an "extra" protection that is not constitutionally required. *Owens v. State*, 531 So. 2d 2, 16 (Ala.Crim.App. 1986), *rev'd on other grounds*, 531 So. 2d 21 (Ala. 1987); *Jones v. State*, 456 So. 2d at 382-83.

imprisonment without parole. . . . [T]hereafter, the trial court sentenced appellant to death by electrocution."). The courts often observe that the trial judge considered the jury verdict and end their analysis of the case right there. *See, e.g., Freeman v. State*, 555 So. 2d 196, 213-14 (Ala.Crim.App. 1988) ("The trial judge's findings clearly showed that he considered the jury's advisory verdict."), *cert. denied*, 496 U.S. 912 (1990); *Harrell v. State*, 470 So. 2d at 1309 ("The trial judge considered the jury's recommendation. . . . in his written finding."); *Carr v. State*, No. CR-92-362 (Ala.Crim.App. Mar. 4, 1994), slip op. at 22 ("The trial court's sentencing order reflects the fact that the court gave 'consideration to the recommendation of the jury in its advisory verdict that the defendant be sentenced to life without parole.' ")[35]

Alabama's appellate courts have not only failed to analyze the propriety of the override in the overwhelming majority of cases, but they have also tacitly sanctioned every conceivable approach trial courts have used to take account of the jury's role. They have implicitly approved the consideration of the jury's life verdict as a mitigating circumstance, *see, e.g., Coral v. State*, 628 So. 2d 988 (Ala.Crim.App. 1992);

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[35] Even in cases of override, the supreme court's examination of a death sentence is generally limited to the basic concern with passion and prejudice and proportionality accorded all sentences of death and found in most death penalty statutes. Ala. Code § 13A-5-53(b),(c) (1982). *See Clemons v. Mississippi*, 494 U.S. at 744 (Mississippi Supreme Court's performance of proportionality review and finding that death was appropriate when aggravation was compared to mitigation did not salvage death sentence where potentially arbitrary element not specifically addressed).

Musgrove v. State, 519 So. 2d 565 (Ala.Crim.App. 1986); *Jackson v. State*, No. 4 Div. 388 (Ala.Crim.App. Aug. 21, 1992), slip op. at 46-47; as *not* a mitigating circumstance, *see, e.g., Rieber v. State*, No. 91-1500 (Ala.Crim.App. June 17, 1994); *White v. State*, 587 So. 2d 1218, 1231-32 (Ala.Crim.App. 1990), *cert. denied*, 112 S. Ct. 979 (1992); and as something in between. *See, e.g., McMillian v. State*, 594 So. 2d 1253 (Ala.Crim.App. 1991), *remanded*, 594 So. 2d 1288 (Ala. 1992). Overrides have been affirmed when the jury's recommendation was made part of the process of weighing aggravation against mitigation, *see Gentry v. State*, 595 So. 2d 548 (Ala.Crim.App. 1991), and when it was assessed in a separate analysis. *See Tarver v. State*, 500 So. 2d 1232 (Ala.Cr.App. 1986); *McNair v. State*, No. CR-90-1556 (Ala.Crim.App. Jan. 21, 1994). The appellate courts have further sanctioned whatever reasons the trial courts have given for finding the jury verdict lacking. *See, e.g., Boyd v. State*, 542 So. 2d 1247, 1259-60, 1269-70 (Ala.Crim.App. 1988), *cert. denied*, 493 U.S. 883 (1989); *Crowe v. State*, 485 So. 2d 351 at 364-65.[36]

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[36] In affirming a small number of overrides, the courts have provided an analysis that could approximate a standard of review. *See, e.g., Ex parte Hays*, 518 So. 2d at 777 (approving trial court's override because jury life recommendation for man convicted in lynching was "unquestionably a bizarre result"); *Jackson v. State*, No. 4 Div. 388 (Ala.Crim.App. Aug. 21, 1992), slip op. at 44-45 (upholding override where seasoned trial judge determined this was most heinous crime he had ever encountered). Yet while one Alabama Supreme Court justice has averred that the court "is especially sensitive" in evaluating overrides, *Ex parte Tarver*, 553 So. 2d 633, 634 (Ala. 1989) (Maddox, J., concurring), *cert. denied*, 494 U.S. 1090 (1990), this declaration is not borne out by any reasonable review of the cases.

The affirmance of petitioner's death sentence reflects the absence of any real review. Neither state appellate court examined whether the jury's life-without-parole sentence should have been sustained in petitioner's case. The appellate review of the jury's sentencing role in Louise Harris's case consisted of the routine response by the Court of Criminal Appeals that both Alabama and federal law permit the practice of judicial override. (J.A. 89). The state's high court affirmed the death sentence with no more than casual reference to the fact that the jury recommended life. (J.A. 103).[37] Neither court confronted the arbitrary process by which the jury recommendation was rejected nor questioned how that recommendation had been considered. Despite petitioner's objections to the override, the relative sentencing functions of the jury and judge were never reviewed in her case.

"[T]his Court has repeatedly emphasized that meaningful appellate review of death sentences promotes reliability and consistency." *Clemons v. Mississippi*, 494 U.S. 738, 749 (1990) (citations omitted). Appellate review is meant to serve as a check against random or arbitrary sentences of death, *Gregg v. Georgia*, 428 U.S. at 206, and to promote evenhanded, rational and consistent application of the sanction. *Jurek v. Texas*, 428 U.S. 262, 276 (1976). In failing to scrutinize death sentences resulting from overrides, the Alabama appellate courts are not providing meaningful review. *See Stringer v. Black*, 112 S.Ct. 1130,

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[37] On rehearing, the court dismissed Mrs. Harris's contention that judicial override also violated the state constitution. (J.A. 111)

1136 (1992) (close appellate scrutiny required of effect of arbitrary factor on sentencing decision); *Sochor v. Florida*, 112 S.Ct. 2114, 2122, 2123 (1992); *Clemons v. Mississippi*, 494 U.S. at 753-54; *see also Pensinger v. California*, 112 S.Ct. 351 (1991) (O'Connor, J., dissenting from denial of certiorari) (cursory affirmance of death sentence insufficient).[38]

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[38] The lack of any process or standard in Alabama directing the trial judge's consideration of a jury's advisory life verdict runs afoul not only of the Eighth Amendment but also the protections guaranteed under the Due Process Clause of the Fourteenth Amendment. The failure to regulate distribution of authority adequately among decisionmakers has been found to violate basic due process rights in a variety of contexts. For example, this Court recently undertook to determine "what procedures are necessary to ensure that punitive damages are not imposed in an arbitrary manner." *Honda Motor Co. v. Oberg*, 114 S.Ct. 2331, 2334 (1994). The Court held that Oregon's unique system of limiting judicial review of punitive damage awards by juries deprived litigants of due process, and that the very circumscribed review that was provided trial courts could not sufficiently ensure against arbitrariness. Focusing on the absence of guidance for the trial courts and the lack of meaningful review on appeal, the Court held that "when the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of Due Process." *Id.* at 2340. *Cf. Pacific Mutual Life Insurance v. Haslip*, 499 U.S. 1, 19-20 (1990) (upholding punitive damages assessment where Alabama required trial courts to give detailed reasons for interfering with jury's determination, where the appellate courts developed meaningful procedures for scrutinizing process, and where "detailed, substantive standards" were employed).

Like Oregon in *Honda Motor Co.*, Alabama has failed to create a procedure or norm for ensuring that arbitrary factors do not influence the capital sentencing verdict in cases of override. Its failure to furnish guidance to trial courts, to require judges to

IV. ALABAMA MUST CREATE SOME MECHANISM TO ENSURE AGAINST ARBITRARY CONSIDERATION OF A JURY LIFE-WITHOUT-PAROLE RECOMMENDATION AND TO PROVIDE MEANINGFUL APPELLATE REVIEW IN CASES WHERE THAT RECOMMENDATION IS REJECTED.

Alabama's capital sentencing scheme is in violation of basic Eighth Amendment principles at both the trial and appellate levels. The absence of any mechanism regulating the capital sentencing roles of jury and judge places capital defendants at risk of the kind of haphazard treatment of the jury's life recommendation at evidence in Louise Harris's case. *Maynard v. Cartwright*, 486 U.S. at 363; *Clemons v. Mississippi*, 494 U.S. at 748-49. The trial court's unexplained rejection of the advisory verdict, particularly in light of the single aggravating factor and the host of mitigating circumstances it found, was arbitrary. *Spaziano v. Florida*, 468 U.S. at 465-66. *See also Parker v. Dugger*, 498 U.S. at 322 (holding Florida Supreme Court's affirmance of death sentence in override case arbitrary).

Where a death penalty scheme provides for two sentencers, careful scrutiny of the process is particularly important. This Court has noted the significance of an appellate standard in reviewing cases of jury override:

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give detailed reasons on the record for their actions, or to provide meaningful appellate review where jury life recommendations are rejected deprives defendants such as Louise Harris of due process. *See also Gardner v. Florida*, 430 U.S. at 361-62.

> Perhaps most importantly the Florida Supreme Court has held that the following standard must be used to review a trial court's rejection of a jury's recommendation of life: "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be *so clear and convincing that virtually no reasonable person could differ.*"

Dobbert v. Florida, 432 U.S. 282, 295 (1977) (quoting *Tedder v. State*, 322 So. 2d 908, 910 (1975)) (emphasis in *Dobbert*). *See also id.* at 295-96 (*Tedder* rule provides "crucial protection" against standardless override); *Parker v. Dugger*, 498 U.S. at 321 (crucial protection provided in jury override cases by Florida Supreme Court's system of review); *Spaziano v. Florida*, 468 U.S. at 465 (*Tedder* standard affords capital defendants "significant safeguard").[39]

While the Eighth Amendment does not prescribe a particular mechanism for regulating a judge's consideration of a jury life verdict, the Constitution does prohibit imposition of the death penalty through procedures that needlessly undermine the reliability of the capital sentencing process. Mrs. Harris must be sentenced according to a process that is not tainted by arbitrary considerations.

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[39] *See also id.* (Florida takes its standard seriously in evaluating propriety of overrides).

CONCLUSION

For the reasons stated above, the judgment of the Alabama Supreme Court should be reversed insofar as it leaves undisturbed petitioner's sentence of death.

Respectfully submitted,

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August 18, 1994

No. 93-7927

In The
Supreme Court of the United States
October Term, 1994

CURTIS LEE KYLES,

Petitioner,

versus

JOHN WHITLEY, Warden,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

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STATEMENT OF THE CASE

I. Course of Proceedings

Respondent (hereafter, "the State") accepts petitioner's statement of the course of proceedings.

II. Statement of Facts

On Thursday, September 20, 1984, at approximately 2:20 p.m. Delores Dye ("Mrs. Dye") exited the Schwegmann Bros. grocery store ("Schwegmann's") at 5300 Old Gentilly Road in New Orleans and proceeded to her car which was parked in a Schwegmann's lot across the street. Mrs. Dye had parked towards the end of an aisle of cars. Upon reaching her car, Mrs. Dye loaded her bags of groceries into the trunk of her red 1977 Ford LTD. At this point Mrs. Dye was met by a man who attempted to rob her. When Mrs. Dye would not give up the keys to her car, a struggle ensued. Mrs. Dye momentarily broke away and ran to the passenger side of the car but the perpetrator caught up. She screamed as the perpetrator grabbed her left hand. Not wanting to deal with a difficult victim, the perpetrator produced a .32 caliber revolver and shot Mrs. Dye in the left temple at point blank range. Instantly, Mrs. Dye was dead leaving behind a husband, son and grandson.

The perpetrator then calmly bent over, picked up the car keys from Mrs. Dye's hand, got into her car, and drove out of Schwegmann's parking lot onto Chef Menteur Highway. The perpetrator made a right and then another right turn onto France Road.

A. The Police Investigation

Detective John Dillman ("Det. Dillman") of the New Orleans Police Department's Homicide Unit was the chief investigating officer assigned to Mrs. Dye's murder. He arrived on the scene within minutes and immediately found the following five eyewitnesses who gave statements on the scene and later signed typewritten statements at the police homicide office.

1. Henry Williams, a 50 year old Norco employee, was standing at a barricade in Schwegmann's parking lot.

2. Isaac Smallwood, a 34 year old Norco employee, was working standing at the old gas pumps in Schwegmann's parking lot.

3. Edward Williams, a 16 year old high school student, was waiting for a bus on Chef Menteur Highway in front of Schwegmann's.

4. Willie Jones, a 45 year old Norco employee, was working in the Schwegmann's lot.

5. Lionel Plick, a 62 year old man, was waiting for a bus on Chef Menteur Highway in front of Schwegmann's.

Later that day when Det. Dillman returned to the homicide office he discovered the existence of the following two additional eyewitnesses who had left the crime scene and later called the police to report the murder.

1. Robert Territo, 19 years old, was in his company truck waiting for a red light on Chef Menteur Highway.

2. Darlene Cahill (now "Darlene Cahill Kersh") witnessed the altercation from approximately 100 ft. away while riding in a vehicle on Chef Menteur Highway.

Every witness described the perpetrator as a young black man with his hair in braids or plaits.

The police were substantially without leads until Saturday evening September 22, 1984, when a man identifying himself as James Joseph[1] ("Beanie") contacted police to report that he was in possession of a red Ford Thunderbird which he believed might belong to Mrs. Dye. Beanie stated that he had purchased the car from his friend, Curtis (later identified to be Curtis Kyles), and discovered that it may be Mrs. Dye's car when he read about the murder in the paper.[2]

Detective John Miller and Sergeant James Eaton met with Beanie that evening at approximately 10:00 p.m. at a pre-arranged location. Det. Miller wore a microphone for his own protection. During this meeting Beanie told Det. Miller and Sgt. Eaton that he purchased Mrs. Dye's automobile from Kyles on Friday, September 21, 1984. Beanie repeated to them that he concluded the car may belong to

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[1] James Joseph had several aliases. He was also known as Joseph Banks, Beanie Banks, and Joseph Brown. His real name is Joseph Wallace. Throughout this brief, Joseph Wallace will be referred to as "Beanie."

[2] The NOPD supplemental police report indicates that Beanie stated in his telephone call that he purchased the car from Kyles on Thursday, September 20, 1984. During his subsequent taped conversation with Detective John Miller on Saturday, September 22, 1984, however, Beanie stated that he purchased the car from Kyles on Friday, September 21, 1984.

Mrs. Dye after reading about the murder in the newspaper. Beanie led Det. Miller and Sgt. Eaton to Mrs. Dye's Ford LTD which police then seized and took to the NOPD Crime Lab Cage for analysis. Beanie then accompanied Det. Miller and Sgt. Eaton to Schwegmann's and to Kyles' residence at 2313 Desire Street. At approximately 12:30 a.m. on Sunday, September 23, 1984, Det. Miller conducted an extensive interview with Beanie at police headquarters, which culminated in a signed statement. During this interview, Beanie repeated substantially what he had earlier told Eaton and Miller.[3]

As a result of the leads supplied by Beanie, Det. Dillman ordered police officers Lambert and Saladino to retrieve garbage from the curb in front of Kyles's residence at 2313 Desire Street. The officers seized five bags of garbage from that location at approximately 1:00 a.m. on Monday, September 24. The garbage bags were immediately locked in the Crime Lab Cage for analysis.

On Sunday, September 23, 1984, Det. Dillman obtained an arrest warrant for Kyles and a search warrant for the residence at 2313 Desire Street. These were executed on Monday morning, September 24th.

Kyles was apprehended without incident. Several incriminatory items of evidence, including the murder

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[3] J.A. 214-215. In his written statement Beanie indicates that his brother-in-law, Ronald Craig, told him that the car was stolen based upon his brother-in-law's viewing of television and newspaper reports. Previously, Beanie told Det. Miller and Sgt. Eaton that he himself learned of the possibility from the newspaper.

weapon, were seized from Kyles's residence at 2313 Desire Street.[4]

Later that day (September 24), Det. Dillman conducted photographic line-ups with six photographs, including Kyles's photograph. Det. Dillman showed the photo line-up separately to Smallwood, Jones, Henry Williams, and Territo. Smallwood, Territo and Henry Williams positively identified Kyles's photograph as that of the murderer. Jones was only able to make a tentative identification of Kyles.[5] Cahill was not shown a photo

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[4] The evidence seized included:

1. Eight Schwegmann's grocery bags from a kitchen cabinet.
2. One .32 caliber revolver containing five live rounds and one spent round located behind the kitchen stove. This was later determined to be the murder weapon.
3. One homemade holster from a cedar chest in the bedroom.
4. One brown case with forty-five live cartridges of various calibers from a dresser drawer in the bedroom.
5. One box of .32 caliber ammunition from a dresser drawer in the bedroom.
6. One .22 caliber rifle from under a mattress in the bedroom.
7. Fourteen .22 caliber cartridges from under a mattress in the bedroom.
8. Schwegmann's bag filled with a large amount of cat and dog food from the kitchen.

[5] Jones did not testify at trial. After trial the defense contacted some of the witnesses and showed them a defense version of a photo line-up in which photos of Kyles and Beanie appeared and in which the hair of Kyles had been superimposed on the head of Beanie. Jones nevertheless picked out the photo

lineup but made an in-court identification on November 26, 1984, during Kyles's first trial, and again at his second trial on December 8, 1984.

B. The Trial

Prosecutors Cliff Strider and Jim Williams represented the State in both the first and second trials. Martin Regan was defense counsel for both trials.

A pathologist opened the trial with testimony about Mrs. Dye's wound and cause of death. The State followed with Territo, Cahill, Smallwood, and Henry Williams, who testified regarding the shooting. Det. Dillman, the chief investigating officer, testified regarding the police investigation, followed by crime scene and laboratory technicians. The State's case ended with Robert Dye, Mrs. Dye's husband, who established that Mrs. Dye often purchased the same brands of cat and dog food that were found in Kyles's residence.

The defense argued at trial that Beanie was the perpetrator instead of Kyles. In support of this assertion defense witnesses, who were friends and relatives of Kyles, testified that Beanie was seen driving Mrs. Dye's automobile on Thursday, September 20; that Beanie changed the license plate on the vehicle, and offered to sell the vehicle on Friday, September 21; and that Beanie was seen looking behind Kyles's kitchen stove on Sunday, September 23.

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of Kyles as the murderer and rejected the photo of Beanie. H. 4-7-89, p. 5.

The State recalled Territo, Cahill, Smallwood and Henry Williams during rebuttal. For each witness, the State brought in Beanie to stand next to Kyles in front of the jury. Without hesitation each witness professed their conviction that Kyles, not Beanie, murdered Mrs. Dye.

The jury returned a verdict of guilty of first degree murder.

C. The Sentencing Phase of the Trial

The State re-introduced its case presented during the guilt phase of trial and presented no other evidence. Kyles's sisters and brothers testified on his behalf. Kyles took the stand as well. The jury recommended the death sentence, which was imposed by the court.

SUMMARY OF THE ARGUMENT

Petitioner Kyles claims he was deprived of fundamental fairness at his trial in both the guilt and sentencing phases because prosecutors and police withheld exculpatory evidence and presented "false" evidence against him.

The State did not withhold exculpatory evidence and did not present false evidence.

The State presented four eyewitnesses at trial who identified Kyles as the perpetrator of a vicious murder committed during an armed robbery at a grocery store. Three of these witnesses saw Kyles shoot the victim, and the fourth saw Kyles leave the area. These witnesses are solid in their identifications of Kyles, and were the heart

of the State's case at trial. Kyles complains that written statements taken from most of these witnesses were inconsistent with testimony given by the witnesses in court, and that he was not provided with the statements before trial. The fact is that these statements contained a few inconsistencies, but the inconsistencies which were present were inconsequential.

Kyles claims he was framed by the real murderer, named "Beanie," who informed on him to police. When police and a prosecutor talked to Beanie they documented their conversations with him. Kyles now claims that some of the information Beanie gave the State was exculpatory. The information Beanie gave police was not always consistent, but that information did inculpate Kyles and did not exculpate him.

Beanie did not testify at Kyles's trial and the State did not present a theory of the case to the jury which was dependent on Beanie's credibility. Police and prosecutors did not consider Beanie to be a suspect in the murder. It did not occur to them to turn over documentation of their relations with Beanie. Kyles likely would have used some of the police information if he had it but the information was not material exculpatory evidence because there is no reasonable probability that, had the information been turned over to the defense, the result of the trial would have been different. The failure to turn over this material does not undermine confidence in the outcome of the trial.

Kyles's *Brady* claims are properly evaluated under *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), since the issue he presents is the

materiality of the allegedly exculpatory or favorable evidence. His claims of police and prosecutor misconduct largely involve issues of withheld evidence and thus can be analyzed in terms of *Bagley*.

Kyles's claim that prosecutors and police withheld material exculpatory evidence fails because he has not demonstrated that the withheld information was material as that term was defined in *Bagley*. Whether considered separately or collectively, the withheld matter does not give rise to "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley, supra*, at 105 S.Ct. 3385 (opinion of Blackmun, J.).

The facts of this case validate Justice Blackmun's conclusion in *Bagley* that "[A] rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments." *Id.*, at 105 S.Ct. 3380 n. 7.

ARGUMENT

I.

THE STATE PRESENTED CONVINCING EVIDENCE OF PETITIONER'S GUILT AT THE TRIAL.

The four eyewitnesses who testified at Kyles's December 8-10, 1984, trial each observed Kyles drive off the Schwegmann's parking lot after Mrs. Dye was shot. Three of the four actually witnessed Kyles shoot Mrs.

Dye. Their attention had been riveted on Kyles as, in the bright afternoon sunlight, Mrs. Dye screamed. They then observed Kyles shoot her, get into her automobile, and drive away. Each positively identified Kyles at trial. In addition, the State presented substantial physical evidence taken from Mrs. Dye's car and from Kyles's residence.

A. FOUR EYEWITNESSES POSITIVELY IDENTIFIED KYLES AS MRS. DYE'S MURDERER.

At a pretrial hearing on Kyles's motion to suppress identification, Det. Dillman testified that eyewitnesses Smallwood, Williams, and Territo instantaneously identified Kyles as the murderer upon looking at the lineup photographs. R. vol. 2, p. 8. Kyles's trial attorney, Martin Regan, cross-examined these witnesses extensively during that hearing, and thus was fully aware before trial of what these witnesses claimed to have seen.[6]

The state called four eyewitnesses during the guilt phase of the trial who identified Kyles in court as the murderer of Delores Dye[7]:

1. *ROBERT JOSEPH TERRITO*, was delivering equipment in his company's truck and was stopped in traffic when he heard Mrs. Dye scream. He was only

[6] His cross-examination of Mr. Smallwood covered over six pages of transcript (R vol. 2, pps. 14-20); his cross-examination of Mr. Williams covered almost four pages (R vol. 2, pps. 24-27); and his cross-examination of Mr. Territo covered four transcribed pages (R. vol. 2, pps. 32-35).

[7] R. vol 2, trial transcript, Dec. 6, 1984, pps. 11-62.

thirty to forty yards from Mrs. Dye and saw everything that happened after the scream. After the perpetrator drove Mrs. Dye's car off the Schwegmann's lot he pulled up next to Territo, who watched him constantly:

> "I got a good look at him. If I had been in the passenger seat of the little truck, I could have reached out and not even stretched my arm out, I could have grabbed hold of him." R. vol. 2, trial transcript, Dec. 6, 1984, p. 13, 14.

2. *DARLENE CAHILL* was a passenger in an automobile when she witnessed the struggle between Mrs. Dye and the perpetrator. She was within 100 feet of the shooting. She and her companion tried to follow the perpetrator in traffic, saw him from the side about a car length away, and got a good look at him (R. vol. 2, p. 32). Her automobile drove to the side of the perpetrator's car: "We could have hit the driver's door if we wanted to," she testified. *Id.*, p. 34.

3. *ISAAC SMALLWOOD*, a Norco Construction Company employee, was working on a gas pump on the Schwegmann's lot when the murder occurred. He told Det. Dillman that his attention was attracted by the shot, and so testified at Kyles' first trial.[8] He testified at the second trial that he saw the entire incident from a distance of seventy-five to eighty feet. *Id.*, p. 43. Smallwood testified that when Kyles drove off the parking lot he drove within about twenty-five feet of Smallwood (*Id.*, p. 43), and when Kyles drove by on the highway he was about fifteen feet from Smallwood. *Id.*, p. 45. Smallwood

[8] Trial transcript, Nov. 26, 1984, testimony of Isaac Smallwood, p. 51.

identified Kyles as the perpetrator and said he got a good look at him. *Id.*, p. 43.

4. *HENRY WILLIAMS*, also an employee of Norco Construction Company working on the parking lot, testified that he witnessed the entire event, and that after shooting Mrs. Dye, the perpetrator passed within ten feet of him. *Id.*, p. 55.

After the defense presented its case and revealed its contention that Beanie Wallace was the murderer, the State recalled each of its four eyewitnesses on rebuttal. The State brought Beanie into the courtroom separately for each witness and had him stand next to Kyles, so each witness could compare the two men. Their reactions:

1. Territo chose Kyles over Beanie as the perpetrator (R. vol. 3, trial transcript, Dec. 7, 1984, p. 374), and testified after seeing them together that there was "No doubt in my mind" that Kyles killed Mrs. Dye. R. vol. 3, trial transcript, Dec. 7, 1984, p. 378.

2. Cahill testified after comparing the two that "I'm positive it wasn't the other man" (Beanie) *Id.*, p. 381, and testified she had never seen Beanie before. Speaking of Kyles, she again confirmed her identification, stating:

   "I know it was him. I seen him. I seen his face and I know the color of his skin. I know it. I know it's him." *Id.*, p. 383.[9]

[9] Kyles has filed a motion in state court for a new trial, alleging that Darlene Cahill (now Darlene Kersh) has retracted the testimony she gave at his trial and now claims she could not identify the perpetrator. That motion has not been heard on the merits in any court. The allegation was first made while Kyles's present claim was on appeal in the Fifth Circuit, but was dismissed as untimely filed. See Order of Judge Arceneaux, J.A. 184-7. The Court of Appeals instructed the district court to deny relief on the ground that a petitioner may not use a Rule 60(b) motion to raise constitutional claims that were not included in the original habeas petition. J.A. 43. The Louisiana Supreme Court has stayed action on the motion pending disposition of the present claim in this Court.

3. Smallwood reconfirmed his choice of Kyles. "I'm positive," he testified. *Id.*, p. 387.

4. Henry Williams, when confronted with Beanie, testified that he was "positive" he did not see Beanie in the parking lot. He had "No doubt in my mind." *Id.*, p. 391.

The state trial judge, who presided over both trials and the state post-conviction hearing, pointed out in his judgment on the post-conviction application that Kyles and Beanie "clearly and distinctly did *not resemble*" each other. J.A. 36 (emphasis in the original). Their distinct differences in physical appearance – Kyles was taller, darker, and thinner than Beanie – is evident from examining the photographs of the two men which were introduced into evidence.[10]

[10] The Fifth Circuit majority opinion stated that: "Comparing photographs of Kyles and Beanie, it is evident that the former is taller, thinner, and has a narrower face. More importantly, the eyewitnesses and the jury were allowed to compare Beanie and Kyles. After doing so, Smallwood stated, 'they don't look nothing alike to me.' Each eyewitness repeated their conviction that Kyles was the gunman they saw at Schwegmann's." J.A. 55.

1. KYLES' POST-CONVICTION ATTACK ON THE EYEWITNESS TESTIMONY IS WITHOUT MERIT.

Kyles, faced with the direct testimony of Territo, Cahill, Smallwood, and Henry Williams, now claims that he was denied the benefit of the use of the written statements taken from three of these witnesses (Territo, Smallwood, and Williams), as well as written statements taken from three other witnesses who did not testify at trial (Willie Jones, Lionel Plick, and Edward Williams). Kyles claims these statements would have aided him in impeaching the witnesses' testimony.[11]

Under Louisiana law the State has no obligation to turn over written statements of its witnesses which are not exculpatory. The State submits that an examination of these written statements shows that they are not exculpatory evidence as defined by this Court. *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

a. Discrepancies in Height, Weight, and Age

In his brief, Kyles provided a chart which lists the physical characteristics of the perpetrator as described in the written statements of the eyewitnesses (brief, appendix "C"). These descriptions present a consistent picture of a perpetrator who was a young Afro-American, of slight build, with braided or platted hair. This description is consistent with Kyles's physical appearance. Kyles cites

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[11] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The statements are found at J.A. 188-213.

slight differences in the witnesses' estimates of the perpetrator's age, height, and weight, as discrepancies and argues that these discrepancies constitute material exculpatory evidence.

Neither the State nor the defense asked any of the eyewitnesses who provided written statements to describe the perpetrator's height, weight, or age, at the trial or in any pretrial hearing.[12] Thus, the estimates of these characteristics as expressed in the written statements given to the police did not contradict testimony given by these witnesses and could not have been used to impeach their testimony.

Det. Dillman testified at pretrial that "[p]ossibly the only discrepancy [in the written statements] would have been in height."[13] Dillman then proceeded to describe discrepancies in height (5'8" to 6' tall), and age ("twenty to twenty-eight, possibly"), with no other discrepancies.[14] As petitioner's diagram in appendix "C" reflects, Dillman's statement was not entirely correct, since the estimated height differences in the six written statements range from five feet, four inches to close to six feet, and the estimated age differences range from seventeen to

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[12] The State did ask Darlene Cahill at Kyles' first trial to give a general description of the perpetrator, to which she replied, "[a]pproximately five-six, five-five . . . ". Trial transcript, Nov. 26, 1984, p. 27. However, Ms. Cahill did not provide a written statement to police, nor was similar testimony elicited in any later proceeding from her. Thus, her testimony is not subject to Kyles's impeachment argument.

[13] Hearing, November 6, 1984, testimony of Det. John Dillman, p. 7.

[14] *Id.*, pps. 7-8.

twenty-eight years. Also, Smallwood's written statement claims the perpetrator had a light mustache and his braids went to his shoulders.[15] However, there is no reason to believe that Dillman's testimony did not represent his good faith recollection at the time, and he was not far off the mark. The discrepancies in the written statements of the eyewitnesses are within an expected range. The age, height, and weight discrepancies in the written statements do not contradict the testimony of the eyewitnesses in court and do not suggest that Beanie may have been the perpetrator. It must be recognized that had Dillman's estimates been more accurate Kyles might have inquired into these discrepancies at trial, slight as they were. These written statements would have been of very limited value, if any, to Kyles. The State submits that existence of the minor discrepancies in these statements is exactly what the Court had in mind when it held in *Bagley* that exculpatory evidence must not only be favorable, but also material, before the state must provide it to the defense.[16] The statements did not constitute material exculpatory evidence.

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[15] J.A. 189. Smallwood's written statement also contains a claim that he did not see the incident before the shot was fired. This is treated in the next part of this argument.

[16] *United States v. Bagley*, 105 S.Ct. 3375, 3380 n. 7 (plurality opinion): " . . . [A] rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments."

b. Isaac Smallwood's Testimony

Shortly after the murder Isaac Smallwood gave the police a written statement in which he stated that he was standing near the gas pumps on the Schwegmann parking lot when he heard a loud pop. "When I looked around I saw a lady laying on the ground, and there was a red car coming toward me." J.A. 188-190. He stated that he did not see a weapon, that the car passed near him, and he thought he could identify the person driving the car.

Smallwood's testimony at Kyles's first trial was consistent with his written statement to police shortly after the murder. Smallwood testified during the first trial that he heard the shot and when he looked in the direction from which the shot came the lady was already on the ground.[17]

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[17] At Kyles' first trial, on November 26, 1984, the prosecutor asked Mr. Smallwood what he saw, to which Smallwood responded:

> A. Yes, me and my co-workers, we were standing by until my foreman come back from Schwegmann's from using the telephone, and see I had my back turned to the Chef [highway], and that's when *I heard something went off*; that's when my podnah, Henry [Williams], he said "a woman over there got shot," *so I looked over there towards the lady laying on the ground*, and the guy got up into this woman's car and passed me by in the lot.
>
> - - - - -
>
> Q. *When you looked over there*, what was that individual doing? The lady – *was the lady already on the ground?*
>
> A. *Yes.*
>
> Q. And what was the individual who drove the car, what was he doing?

At the second trial, however, Smallwood testified that he saw the whole incident, including the shooting itself. Nevertheless, Regan, defense counsel at both the first and second trial, was present and heard Smallwood's testimony. Therefore, Regan was, or should have been, aware of Smallwood's testimony regarding the sequence of events. Apparently Regan did not conclude that the discrepancy was worth examining on cross-examination, or perhaps did not even notice the discrepancy because it pertained to a fact which was not questioned at the trial – that the same man who drove Mrs. Dye's car off the parking lot had also shot her.

Kyles now claims that the state should have provided Smallwood's written statement, because that statement partially contradicts his testimony at the second trial. Kyles fails to point out that Smallwood's testimony at the first trial also contradicts his testimony at the second trial, and Regan was present at both to recognize the discrepancy himself. Thus, Smallwood's written statement would not point out any discrepancy which should not have already been apparent on the face of Smallwood's trial testimony. Neither Kyles's defense counsel nor the prosecutors paid attention to the difference in

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A. He just got in the car like it was his own car, and eased over, I guess going on about his own business. Tr. Trans., State v. Curtis Kyles, Criminal District Court, No. 304-163, testimony of Isaac Smallwood at trial on the merits, 11-26-84, p. 50, 51.

At the hearing on Kyles's postconviction application for habeas corpus relief, during the testimony given by his trial attorney, Martin Regan, the judge took judicial notice of the testimony at the first and second trials. Hearing, 2-20-89, testimony of Martin Regan, p. 5.

testimony between the first trial, which was consistent with the statement, and the testimony at the second trial. The difference was inconsequential.

The Fifth Circuit majority, treating this discrepancy, stated:

> Kyles overlooks, however, that Smallwood consistently stated that the gunman then drove the LTD close by him. Smallwood always maintained that he got a good look at the killer then, and like Williams, immediately recognized Kyles in the photographic lineup. Smallwood never made a statement calling his ability to recognize the gunman into question, and we are not persuaded that use of this material by the defense would have undermined the force of his identification, particularly in light of its corroboration by others.
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> J.A. 55

B. ALL PHYSICAL EVIDENCE PRODUCED BY THE STATE AT THE TRIAL IMPLICATED KYLES AS MRS. DYE'S MURDERER.

Additional supporting evidence offered by the state during the guilt phase of the trial included: (1) a Schwegmann's sales slip found in Mrs. Dye's automobile which contained two of Kyles's fingerprints; (2) the murder weapon (.32 cal. pistol) found in Kyles' residence behind a kitchen stove; (3) Mrs. Dye's purse, personal papers, and credit cards, found in a trash bag outside Kyles' residence; and (4) Schwegmann's shopping bags seized from Kyles' kitchen, along with cans of the same brands of pet food often purchased by Mrs. Dye.

II.

KYLES HAD CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL AT HIS TRIAL.

Kyles initially claimed that his trial counsel, Martin Regan, was ineffective within the meaning of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct 2052, 80 L.Ed.2d 674 (1984). He did not pursue this argument in his brief to this Court, although effective performance of trial counsel is one of the issues approved by the Court for review. The Court of Appeals considered only the claim that counsel was ineffective because he did not interview Beanie and call him to the witness stand at trial as a defense witness. This limited claim is treated here because the dissent in the Court of Appeals decision addressed the issue at some length. J.A. 93-97, 108-109.

Martin Regan represented Kyles at trial. Regan is a respected New Orleans attorney who, at the time of Kyles's trial, had tried over one hundred jury trials and participated in at least three capital trials. H 2-20-89, p. 2. Judge Waldron, who presided over the trial and the state postconviction hearing, concluded that "Mr. Regan provided the defendant with a vigorous, dedicated and more than adequate defense."[18]

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[18] Judgment, J.A. 31. Judge Waldron continued, "As he always has been, in the many cases he has tried before this Court, Mr. Regan was a tenacious advocate on behalf of his client. His reputation as an attorney who is always prepared for, familiar with his case, and professional in his presentation remains intact despite the outcome of this particular case." J.A. 31-32.

Regan testified at the postconviction hearing that he did not call Beanie as a witness at the trial because he erroneously thought that under Louisiana law Beanie must be hostile and his testimony must be surprising before Beanie could be cross-examined. The State submits that Regan's decision, even if based upon an erroneous understanding of the law, was proper and Kyles suffered no prejudice from the decision.

If Regan had called Beanie as a witness the likelihood is that Beanie would have refused to testify and invoked a "blanket" Fifth Amendment privilege.[19] Under Louisiana procedure the determination as to Beanie's right to assert his Fifth Amendment privilege would have been made outside the jury's presence and the invocation by Beanie would not, as the dissent suggests, "have presented Kyles with valuable ammunition supporting the theory of the defense." J.A. 108. *State v. Berry*, 324 So.2d 822, 829-830 (La. 1975). Indeed, in Louisiana it is improper conduct for either the prosecution or the defense knowingly to call a witness who will claim a privilege, for the purpose of impressing upon the jury the

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[19] As Judge King pointed out in her dissent, "[t]he entire purpose of calling Wallace [Beanie] would have been to expose his leading role in the development of the prosecution's case, to impeach him and, in the process, to accuse him of framing Kyles and suggest that Wallace had some role in the murder." J.A. 97. However, Judge King was incorrect in concluding that there was a "serious question" as to whether Beanie could have taken a "blanket" Fifth Amendment privilege as to all questions asked. Under Louisiana law Beanie had the right to assert such a blanket privilege, since the evidence introduced by the defense implied that he was the perpetrator. *State v. Savoy*, 537 So.2d 246, 249-250 (La. App. 4 Cir. 1988).

fact of the claim of privilege. *State v. Berry, supra,* at. 830.[20] Once the defense called Beanie the trial court, which was aware of the defense tactic involved, surely would have advised Beanie of his rights and assigned counsel to advise him, as the court did with two other witnesses who appeared on behalf of Kyles.[21]

In the unlikely event that Beanie was called to the stand and did not invoke his Fifth Amendment privilege, he would have surely testified that, as he told police, he purchased Mrs. Dye's car from Kyles, he helped Kyles remove Mrs. Dye's groceries from her car, he took Kyles to Schwegmann's to retrieve his own car, and he knew Kyles carried a .32 cal. pistol. This evidence was not presented by the State, although some of it was brought out on cross-examination of other witnesses by the defense.

To Kyles, Beanie was at best a "loose cannon," as the Court of Appeals majority noted. J.A. 70. Regan could have cross-examined, but his cross-examination would,

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[20] The Louisiana Supreme Court cites as authority for its conclusion the American Bar Association Standards of Criminal Justice, Relating to the Prosecution Function, Standard 5.7(c), and Relating to the Defense Function, Standard 7.6(c) (1971). *Id.*, p. 830.

[21] The trial court appointed an attorney to advise defense witnesses Kevin Black and Johnny Burnes regarding their right to assert their Fifth Amendment privilege, once it became apparent that they may have been accessories after the fact to the murder. R. vol. 2, pps. 194-202. This was done outside the presence of the jury and the procedure was approved in this case by the Louisiana Supreme Court. *State v. Kyles*, 513 So.2d 265, 271-272 (La. 1987), J.A. 12-14.

under Louisiana law at the time, have been limited to impeachment, and, even then, "the impeachment must be limited to evidence of prior contradictory statements." La. R.S. 15:487; see J.A. 32. Contrary to the argument of the dissent below, the limitation of Beanie's cross-examination to impeachment would have prevented or at least drastically limited exploration by Kyles of his claim that Beanie was the murderer. It would also have prevented exploration of other aspects of Beanie's life, such as his prior arrests or possible involvement in crimes other than the murder of Mrs. Dye.

Martin Regan made the correct decision when he decided not to call Beanie as a witness at trial.[22]

III. THE STATE DID NOT FAIL TO DISCLOSE FAVORABLE MATERIAL EVIDENCE, AND DID NOT PRESENT FALSE EVIDENCE AT TRIAL.

The State emphatically denies Kyles's claim that the prosecutors and the police in Kyles's case suppressed information which was favorable and material to Kyles's defense, and used "false" evidence at his trial. The record simply does not support Kyles's charges. An examination of these claims shows that the police and prosecutors acted in good faith in preparing and presenting an overwhelming case against Kyles, and the items possessed by the police about which Kyles now complains did not constitute material exculpatory evidence.

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[22] The Court of Appeals majority treats *Strickland* at J.A. 69-73.

While Kyles has made many claims, they are all without substance. As the federal district court commented while considering Kyles's claims below, "Twenty times zero is still zero." J.A. 180.

A. THE STATE WAS NOT BOUND TO SUPPLY EVIDENCE OF BEANIE'S CHARACTER OR CREDIBILITY.

The Court of Appeals majority noted the fact that the State neither called Beanie as a witness nor informed the jury of the contents of his initial tip to police.[23] As that majority stated, "[p]rosecution witnesses did not mention Beanie by name except in response to the cross-examination by [defense attorney Martin] Regan." J.A. 69. Thus, the State did not recommend Beanie's character or credibility to the jury, and, because neither party called Beanie as a witness, his character and credibility were not issues at the trial. The State did not even claim that Beanie was an innocent purchaser of Mrs. Dye's vehicle,[24] and did not propose a theory of the case to the jury in which Beanie played a part. Beanie "made our case," as prosecutor Strider testified, by providing Kyles's name to police, thus enabling them to conduct photographic lineups with the witnesses which included Kyles's picture.[25]

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[23] Opinion of the Fifth Circuit Court of Appeals, at J.A. 58.

[24] The Fifth Circuit majority noted that the " . . . state never urged and no prosecution witness ever stated that Beanie was an innocent buyer." J.A. 58.

[25] H 2-20-89, testimony of Cliff Strider, p. 116-117. United States District Court Judge Arceneaux stated: "Beanie's testimony and good character were not an issue. Beanie supplied a name. That is virtually all he did." J.A. 169.

However, the State was not obligated to provide evidence of his character, his credibility, or his lack of credibility.

B. THE STATE DID NOT SUPPRESS ANY FAVORABLE MATERIAL EVIDENCE WHICH SHOWED EITHER THAT BEANIE FRAMED KYLES OR MURDERED MRS. DYE.

Kyles claims that the record contains a strong inference that Beanie had a deal with the State for favorable treatment in exchange for information,[26] and implies that the State covered up Beanie's acts in framing Kyles. The record does not support this allegation.

Kyles was convicted of first degree murder less than three months after his arrest. During this brief period the prosecutors, Cliff Strider and Jim Williams, prepared their case for trial by interviewing the homicide detectives assigned to the case, particularly the case officer, Det. Dillman, and homicide Det. John Miller. The prosecutors also interviewed the witnesses to the shooting and had access to some of the police "dailies." They did not receive the police homicide report until after Kyles was tried and convicted.[27]

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[26] Petitioner's brief, p. 35.

[27] The homicide report in this case was forwarded to the District Attorney's office on December 10, 1984, two days after the trial had been completed. Testimony of Cliff Strider, H 2-20-89, p. 102-103, 107-108; testimony of Det. Robert Kessel, H 3-3-89, p. 25.

The police never considered Beanie a suspect in the Dye murder.[28] After the first trial, when Kyles introduced his defense that Beanie had perpetrated the murder, prosecutor Cliff Strider interviewed Beanie for the first time and satisfied himself that Beanie was not the murderer.[29] Beanie was clearly an unsavory character, an informant whom Det. Miller believed to be "a con-man, drug user at times, [and] thief,"[30] a man who was well acquainted with Kyles and his friends,[31] but who was not Mrs. Dye's murderer.

Since the police and prosecutors did not consider Beanie to be the murderer, they did not view their relations with him or his activities to be favorable material evidence which Kyles could use in his own defense. Kyles's complaints regarding evidence the police possessed about Beanie are as follows:

1. The Tape of Beanie's Meeting with Det. Miller on Saturday, September 22, 1984.

The Saturday evening meeting between Det. John Miller and Beanie was their first time to meet in person.[32] Sgt. Eaton placed a microphone on Det. Miller before Miller went to the meeting because he was not sure what

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[28] H 2-24-89, testimony of Det. John Miller, p. 22; testimony of Det. John Dillman, H 2-24-89, p. 71.

[29] H 2-20-89, p. 141.

[30] H 2-24-89, testimony of Det. John Miller, p. 22.

[31] *Id.*, p. 24.

[32] H 2-24-89, p. 2, testimony of Det. Miller.

Beanie had in mind and wanted to protect Miller.[33] The tape was not brought to the district attorney's office until after the trial and was not seen by prosecutors before trial.[34] Det. Dillman did not listen to the tape because police had obtained Beanie's written statement.[35]

Petitioner claims that five parts of the tape contain exculpatory material:

a. The tape shows that Beanie knew where the murder occurred.

Beanie brought Det. Miller and Sgt. Eaton to the location on Schwegmann's parking lot where Beanie claimed Curtis Kyles' automobile was located when he and Kyles retrieved the automobile. Beanie pointed out that was the "same side where the woman was killed at." J.A. 231. He told police that he followed news accounts of the murder, which contained photographic information showing where the shooting occurred.[36] Petitioner argues that Beanie's knowledge of where the murder occurred indicated information which only the perpetrator would know. This conclusion is incorrect.

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[33] Testimony of Det. John Miller, H 2-24-89, p. 26; testimony of Sgt. James Eaton, H 3-3-89, pps. 58-59.

[34] H 3-1-89, pps. 5-6, testimony of assistant district attorney Jim Williams; H 2-20-89, pps. 103-108, 110, testimony of assistant district attorney Cliff Strider.

[35] H 2-24-89, pps. 58-59, testimony of Det. John Dillman.

[36] "I picked up on it when I seen the news and I seen it in the parking lot, and the car was right there." J.A. 229.

Photographs of the murder scene were in New Orleans newspapers and filled New Orleans television, and Beanie carefully followed both. J.A. 247. Prosecutor Cliff Strider concluded in postconviction testimony that everyone who lived in the area knew where the murder occurred.[37] This statement on the tape would have been of no value to Kyles at trial.

b. Beanie made a remark on the tape regarding Kyles's hairstyle.

On the tape Det. Miller asked Beanie about Kyles' hairstyle, which Beanie described as "bushy." J.A. 249. Det. Miller asked Beanie: "Does he ever wear it in plaits?," to which Beanie answered "Uh-huh." *Id.* That is, Beanie signified that Kyles did sometimes wear plaits, the hair style used by the perpetrator at the time of the murder, but Kyles had a bush on "that day," referring to the day after the Dye murder, when Kyles sold him the car. Kyles would have been unlikely to have kept the plaits after a parking lot full of people saw him murder Delores Dye. It is not surprising that the following day he was wearing a bush style hairdo, and the police properly

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[37] H 2-20-89, testimony of Cliff Strider, p. 130: " . . . it was on the T.V., it was on the radio, it was in the newspaper, and I think it was the talk of the town. I mean everybody knew where that occurred. I was in another trial and I knew." Even when the murder first occurred, Strider knew the precise location of the murder: "Near where the old pumps used to be." *Id.* Det. John Miller also emphasized that the case was "played up" on television and in the newspapers. H 2-24-89, p. 15.

attached no significance to the matter.[38] Indeed, if Beanie had been trying to frame Kyles he should have claimed that Kyles wore plaits.

c. Beanie requested on the tape to be reimbursed for the price he had paid for the automobile.

There was never any question that Beanie received money from the police. Det. Dillman acknowledged at the trial, in the presence of the jury, that Beanie was repaid the money ($400.00), he allegedly lost on the car.[39] Det. Miller checked the records during postconviction proceedings and determined that police had paid Beanie a total of $600.00, and this fact was reported to the court.[40]

d. Beanie suggested on the tape that Kyles might put incriminating evidence in his garbage.

Beanie suggested to Sgt. Eaton and Det. Miller that Kyles' garbage "goes out tomorrow" and said "if he's

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[38] Det. John Miller correctly noted in his postconviction testimony: "Well, if I committed a crime and I looked one way, I would do something to alter my appearance, to try and change my identity or the possibility of somebody identifying me." H 2-24-89, p. 50. Miller also testified that there is "nothing difficult at all" about changing a hair style from plaits to a bush. *Id.* It should also be noted that a police photograph taken on June 6, 1984 shows that Beanie was wearing a Jherri curl, not plaits, fifteen weeks before the murder. J.A. 53.

[39] Trial transcript, vol 2, p. 94.

[40] H 2-24-89, p. 20.

smart he'll put it in garbage." J.A. 257. On Sunday night Det. Dillman instructed officers Lambert and Saladino to pick up Kyles' garbage from the curb in front of his residence, which was done.[41]

Kyles now claims that an inter-office memorandum instructing that the garbage be picked up and the taped suggestion by Beanie constitutes favorable evidence for the defense because it shows that Beanie may have planted the victim's purse in Kyles's garbage. The State submits that this conclusion is speculative and the possibility of such was too remote to require that the police consider this to be exculpatory evidence. Anyone could physically have planted the evidence in Kyles's garbage, but there is no evidence that anyone other than residents at Kyles' house did so.

Sgt. Eaton did not consider Beanie's comment to be a suggestion that Beanie might plant evidence, and he did not tell Det. Dillman or prosecutor Strider about Beanie's comment.[42] In context, there was no reason for him to tell them.

e. The tape revealed that Beanie feared apprehension.

Beanie expressed anxiety to Sgt. Eaton and Det. Miller that he had been seen driving Mrs. Dye's automobile. J.A. 246-47. His anger that his acquaintance, Kyles, had exposed him to the danger of being arrested with Mrs.

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[41] R. vol. 2, trial transcript, pps. 63, 112.

[42] Testimony of Sgt. Eaton, H. 3-3-89, p. 65; testimony of Cliff Strider, H. 2-20-89, p. 112.

Dye's automobile may well have been Beanie's chief motivation for calling the police . However, such expressions in no way exculpate Kyles.

2. The Computer Printout Listing Automobiles in Schwegmann's Parking Lot.

At 9:15 p.m. on Thursday, September 20, 1984, about seven hours after Delores Dye was murdered, police surveyed license plates of the vehicles in the immediate area where the murder occurred. These plates were then run through the police computer and a printout made of the results. The printout was discovered in police files during postconviction proceedings, but was never in the district attorney's file.[43] Prosecutor Strider did not see the printout prior to trial.[44] Petitioner now contends the printout was exculpatory, because his vehicle was not listed on the printout.

Petitioner was not a suspect at the time the printout was prepared. Det. John Miller testified in the post-conviction proceedings that not all of the vehicles on the large parking lot at Schwegmann's were included in the survey.[45] The United States District Court and the Fifth

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[43] Testimony of Cliff Strider, H 2-20-89, at p. 136.

[44] *Id.*, p. 135.

[45] Miller was asked whether all of the vehicles were included in the canvass, and Miller replied "not all." Testimony of Det. John Miller, H 2-24-89, p. 11. Det. Miller testified that license numbers were from " . . . a very large parking lot, there were many cars, and. . . . detectives wrote down license numbers on vehicles *in the immediate area of the murder scene." Id.*, p. 12. Indeed, the lot covered five acres, according to the Louisi-

Circuit below concluded that the list was not complete.[46] Since the list included only cars in the immediate area of the murder scene, it could prove nothing if introduced at trial. The list was an investigative tool which produced no helpful information for the police, but was not exculpatory evidence.

3. Information Regarding the Murder of Patricia Leidenheimer.

Kyles claims police should have informed him of an investigation into the unsolved murder of Patricia Leidenheimer, a case in which Beanie admitted being present at Mrs. Leidenheimer's residence during an armed robbery preceding the murder.[47] Homicide Det. Ray Miller (not to be confused with Det. John Miller), the chief investigator in the Leidenheimer case, testified in Kyles's postconviction hearing that no one was charged with the Leidenheimer murder due to a lack of physical evidence.[48]

On November 28, 1984, immediately after Kyles first trial, two of Kyles's friends, Johnny Burnes (Kyles's brother-in-law, who later was convicted of murdering Beanie) and Ronald Gorman (a felon who testified for

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ana Court of Appeals decision in the civil case which arose from this murder. *Dye v. Schwegmann Brothers Giant Supermarkets*, 627 So.2d 688, at 690 (La. App. 4th Cir. 1993)

[46] J.A. 64, 149, 166.

[47] Petitioner's brief, pps. 16-17.

[48] H 3-3-89, testimony of Det. Ray Miller, p. 42.

Kyles at his first trial)[49] went to police and claimed that Beanie admitted killing Mrs. Leidenheimer. Det. Miller concluded that Johnny Burnes may himself have been implicated in the murder because of his knowledge of specific, unpublicized details of the murder.[50] Kyles argues that Beanie was not charged because he was supplying information to the police, but provides no proof of this.[51]

The Leidenheimer investigation cannot reasonably be considered *Brady* material. Even if the unproved assertions of Kyles were true and Beanie murdered Mrs. Leidenheimer, that information does not exculpate Kyles for the murder of Mrs. Dye. Beanie has not been convicted of the Leidenheimer murder, so even if his character had been at issue at Kyles's trial this information could not have been used against him. The Leidenheimer murder was an entirely separate affair from the Dye investigation. Det. Dillman, the chief investigating officer in the Dye case, was not even familiar with the Leidenheimer investigation.[52] This claim is simply without merit.

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[49] Judge Arceneaux referred to Gorman as "a convicted felon whose testimony was and continues to be suspect." J.A. 164.

[50] H 3-3-89, testimony of Det. Ray Miller, p. 43.

[51] Leidenheimer was a neighbor of the then Chief of Police, who took a personal interest in the case and repeatedly contacted the homicide detective assigned the case, Det. Ray Miller, for progress reports on the investigation. H 3-3-89, p. 46, 49. It is extremely unlikely that this murder would have remained unsolved simply to help Beanie.

[52] H 2-24-89, testimony of Det. Dillman, p. 64.

4. The Report of a Car Accident on Crozat Street.

Kyles claims that a report received by police during the Dye investigation concerning an automobile accident on Crozat street in New Orleans was exculpatory and should have been turned over to him.[53] The police report, which was placed into the record,[54] relates that a citizen told police he witnessed a "bright red Thunderbird" turn onto Crozat street and strike a parking meter on September 20, 1984, at 7:00 p.m. Kyles's inference is that this may have been Mrs. Dye's automobile operated by Beanie. However, the report indicates that the car involved in the accident had a black and white checkerboard patterned seat, whereas the photographs in evidence of Mrs. Dye's car clearly show that her car was a dull maroon red LTD with a solid maroon vinyl or leather interior. It could not have been the same car. This report, like other materials in police custody, could not have cleared Kyles of the murder charge.

5. Prosecutor Cliff Strider's Interview with Beanie.

After Kyles's first trial, prosecutor Cliff Strider summoned Beanie to his office, where he questioned him for the first time. Strider took notes of the interview. J.A. 258-262. Kyles now claims that inconsistencies between

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[53] Petitioner's brief, pps. 15-16.

[54] Defense exhibit 2.

what Beanie told Strider and what Beanie had previously told police constitute exculpatory evidence.[55]

Strider's testimony at the postconviction hearing shows that he was unaware of inconsistencies between Beanie's statements to him and Beanie's statements to the police on September 20, 1984.[56] These inconsistencies involve events surrounding Kyles's transfer of Mrs. Dye's car to Beanie, the transfer of groceries from Mrs. Dye's car, and Beanie's assistance to Kyles in retrieving Kyles's car from the Schwegmann's parking lot.

If the State had called Beanie to the witness stand and questioned him, these statements would have been discoverable because of their impeachment value to the defense. However, the State did not call Beanie, and impeachment was not an issue.

If Beanie had admitted to Strider that he was involved in the murder, this would have been exculpatory evidence favorable to Kyles. But Beanie made no such admissions, and Strider satisfied himself that Beanie was not the murderer. H 2-20-89, p. 113.

Under the circumstances, Strider's notes were not material exculpatory evidence which should have been turned over to the defense.

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[55] Petitioner's brief, p. 13.

[56] The hearing was held February 20, 1989.

6. Miscellaneous other complaints.

Kyles complains that the State did not provide him with Beanie's rap sheet,[57] without explaining how this would constitute exculpatory evidence.

He complains that prosecutor Strider persuaded the trial court to advise two defense witnesses, Johnny Burnes and Kevin Black, of their rights under the Fifth Amendment. The Louisiana Supreme Court rejected this argument, *State v. Kyles*, 513 So.2d at 271, and the federal district court agreed that the prosecutor had a legitimate basis for considering prosecution of these witnesses under the accessory statute, La. R.S. 14:25 or the obstruction of justice statute, La. R.S. 14:130.1. J.A. 178-179.

IV. THE COURT OF APPEALS CORRECTLY APPLIED THE LAW.

In *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), the Court clarified the legal standard for determining whether the government's failure to disclose evidence warrants reversal of a conviction. The Court rejected any distinction between impeachment evidence and exculpatory evidence for purposes of the *Brady* rule, and then reformulated the standard of materiality applicable to non-disclosed evidence.

The Court held that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 105 S.Ct. 3385 (opinion

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[57] Petitioner's brief, p. 16.

of Blackman, J.); *See* also *Id.* (opinion of White J., concurring in part and concurring in judgment). Justice Blackman's opinion further defined "a reasonable probability as a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984)).

The State submits that the Court of Appeals correctly applied the rules set by this Court in *Bagley* to the facts of this case. Petitioner Kyles did not prove his allegations that the police withheld material exculpatory evidence, in violation of *Bagley*, or that prosecutors were guilty of misconduct.

Petitioner's complaints regarding the Court of Appeals' application of *Bagley* to the facts of this case may be considered as follows:

1. "The majority below failed to consider the impact that residual doubt has in this case. This was error." Pet. brief, p. 45.

Kyles argued in the Court of Appeals that *Bagley's* analysis cannot be used in capital cases. J.A. 51. However, that court rejected the argument for a stricter scrutiny standard (J.A. 52), and petitioner has not pursued it in his brief here. He complains only that the Court of Appeals failed to consider the effect of residual doubt, referring to that "uncertainty, though not rising to the level of reasonable doubt regarding guilt, [which] might have led . . . a juror to hold out for a life sentence." *State v. Lee*, 524 So.2d 1176, at 1192 (La. 1987).

The difficulty with considering the effect of withheld evidence on residual doubt, if any, in the penalty phase of a capital trial is that there is no measurable index by which to assess residual doubt. After the reasonable doubt standard has been satisfied the only doubt left, presumably, is some kind of psychological doubt which does not lend itself to rational analysis. By definition, the doubt is unreasonable. In Kyles's case, all of the withheld evidence pertained to the question of guilt, not to the penalty he might receive.

This Court held, in *Franklin v. Lynaugh*, 487 U.S. 164 (1988), that a residual doubt instruction is not constitutionally mandated, while recognizing that residual doubts will inure to the defendant's benefit. *Id.* at 173. The Louisiana Supreme Court has affirmed the denial of a lingering or residual doubt jury instruction in Louisiana, stating "This standard of proof has no statutory or jurisprudential basis." *State v. Percy Davis*, ___ So.2d ___, No. 92-KA-1623, 1994 WL 201131 (La.) (La. 1994)

There was really not much the Court of Appeals could have considered beyond its holding that *Bagley* standards do apply to capital cases.

2. "The majority fails to consider the cumulative effect of the withheld information; the court views each suppressed item as separate and apart from each other. This is wrong as a matter of law." Pet. brief, p. 46-47.

There is no reason to assume that the Court of Appeals majority did not consider the cumulative effect

of the withheld information when it concluded, "We are not persuaded that either errors by counsel or prosecutorial misconduct hamstrung Kyles' defense." J.A. 74.

The Fifth Circuit has recognized cumulative error analysis in a habeas case. *Derden v. McNeel*, 938 F.2d 605, 609 (5th Cir. 1991). The circuit has instructed:

> "The sole dilemma for the reviewing court is whether the trial taken as a whole is fundamentally unfair. When a trial is fundamentally unfair, "there is a reasonable probability the verdict might have been different had the trial been properly conducted."
>
> *Id.* (citations omitted)

While the State denies that there were errors to accumulate in Kyles's case, it is evident from the majority opinion that the court considered the evidence as a whole in reaching its decision. This point was made succinctly by Judge Arceneaux below:

> "First, this court has found that none of petitioner's claims has merit; therefore, there is not error to accumulate. 'Zero times twenty is still zero.' *Mullen v. Blackburn*, 808 F.2d 1143, 1147 (5th Cir. 1987)"
>
> J.A. 180

3. **"The majority's assessment that the evidence against Kyles was overwhelming is erroneous, in part because the court fails to make this assessment in light of the defense evidence. It is plainly wrong in 'attach[ing] little significance' to the fact that the jury could not agree on a verdict at the first trial." Pet. brief, p. 47.**

The State submits that the majority did make its assessment in light of the defense evidence. The major part of the opinion written by the majority is spent assessing the defense evidence. The court just did not find the defense evidence persuasive: "Whatever the proof offered in the trial, this transcript contains overwhelming evidence of guilt." J.A. 68, n. 16.

While the Court of Appeals majority attached little significance to the fact that the jury could not agree on a verdict at the first trial, the State suggests that the most apparent difference between the evidence presented in the two trials was that in the second trial the State called Beanie into the courtroom in rebuttal and had the jury and the eyewitnesses view Beanie and Kyles together. The eyewitnesses then testified as to their reactions to seeing Beanie. That may have made the difference.

4. **"In assessing the materiality of the suppressed evidence, the Fifth Circuit majority also fails to take account of other egregious prosecutorial misconduct."** Pet. brief, p. 48.

The "egregious prosecutorial misconduct" to which Kyles refers in this argument is the action of prosecutor Strider in requesting the trial court to advise defense

witnesses Burnes and Black of their rights under the Fifth Amendment.

The State cannot respond to this argument more eloquently or thoroughly than Judge Arceneaux did in his Order and Reasons issued in the United States District Court below:

> This court rejects this argument as did the Louisiana Supreme Court in *Kyles*, 513 So.2d at 271. As stated before, Johnny Burnes' testimony is simply not credible under any circumstances, without any reference to his demeanor. Kevin Black testified that he saw Beanie in the Dye car between 3:15 and 3:30 p.m. on the day of the murder and that Beanie had his hair fixed in braids or plaits at the time. (Trial Testimony at 208-09). In relation to all of the other evidence and testimony adduced, these witnesses' demeanor would not have caused the outcome of this trial to be suspect. In addition the Louisiana Supreme Court found that if Beannie had provided the prosecutor 'information . . . indicating that Burns and Black facilitated defendant's attempts to avoid apprehension and destroy evidence, the prosecutor had a legitimate basis for considering prosecution under the accessory statute, La. R.S. 14:25 or the obstruction of justice statute, La. R.S. 14:130.1.' *Kyles*, 513 So.2d at 272 n. 6.

At the post-conviction hearing, Prosecutor Strider outlined the state's theory of the case as follows:

> Because what happened was that Curtis Kyles shot that lady, he took her car to . . . Kevin Black's apartment, and there is a place where you can park an automobile

> that you can't see it – behind Mr. Black's apartment, you can't see it unless you're standing right there. He then got, I believe Mr. Black, to drive him over to his house. They goofed off and there for a little bit. Then they got Johnny Burnes to take Black, Burnes, Kyles and Beanie back to the parking lot where the car was, and Burnes went in and picked up the car, Kyles' car. And Black and Kyles and Beanie waited . . . in the other parking lot while Johnny went over and picked up the car and drove it to Black's apartment complex, where they swapped the groceries from one car to the other car.

(Post-Conviction Hearings, Strider's Testimony, February 20, 1989, at 128-129). There was reason for Strider to ask for the court's intervention. This court cannot find constitutional error in the actions of the trial court."

J.A. 178-179

Kyles's trial counsel was not ineffective.

The record evidence shows that Kyles's trial counsel was not ineffective within the meaning of *Strickland v. Washington*, 104 S.Ct. 2052 (1984). Kyles did not argue counsel ineffectiveness in his brief to this Court, although the issue was authorized for consideration, nor did he cite *Strickland* in the context of counsel ineffectiveness. The State will therefore submit the matter.

CONCLUSION

For the above reasons, this Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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